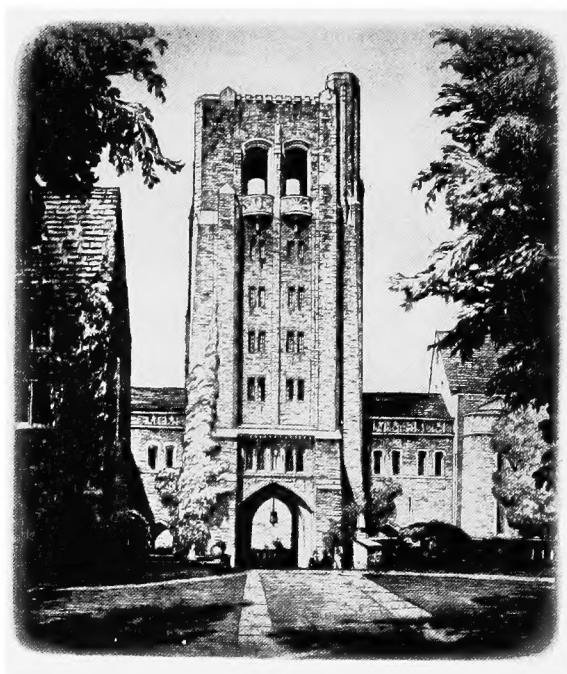




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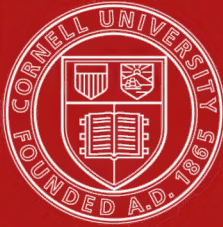


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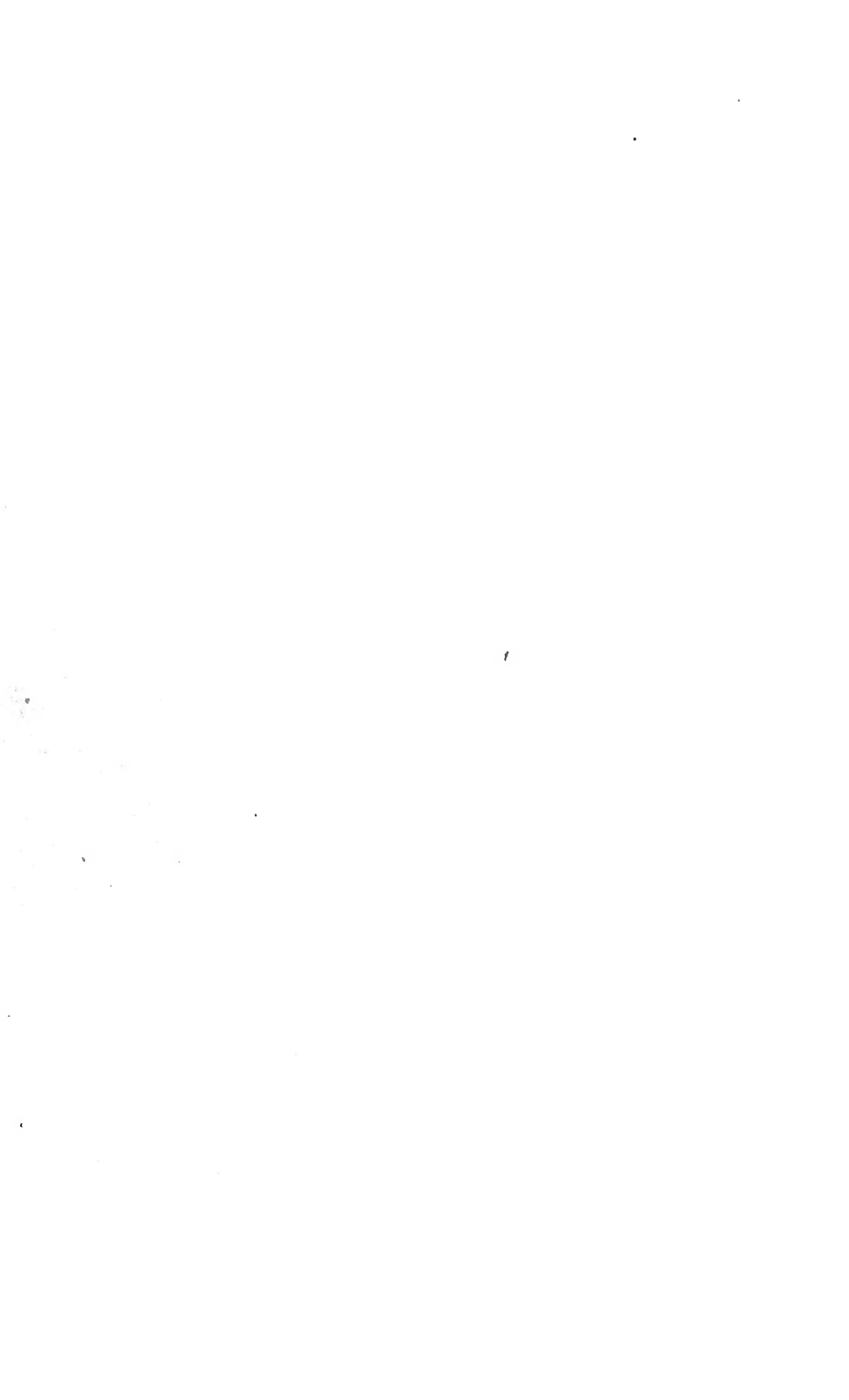




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A TREATISE  
ON  
THE LAW OF BANKS AND BANKING  
VOL. II





A  
TREATISE ON THE LAW  
OF  
BANKS AND BANKING

BY  
JOHN T. MORSE, JR.

*Fifth Edition*

REVISED AND ENLARGED

BY  
JAMES N. CARTER, PH.B., J.M.

VOL. II

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1917

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# CONTENTS

[All references are to Sections, throughout the book.]

## VOLUME TWO

	SECTION
CHAPTER XXXI. PRESENTMENT FOR PAYMENT . . .	421-428
Period of Presentment . . . . .	421
Special Circumstances . . . . .	421-424
Holder <i>v.</i> Drawer . . . . .	421-426
Holder <i>v.</i> Indorser . . . . .	421, 422
Presentment by Mail . . . . .	427
Notice of Dishonor . . . . .	428
CHAPTER XXXII. PAYMENT OF CHECKS . . .	431-460 A
Signature . . . . .	432-440 A
Agent's . . . . .	433
Married Woman . . . . .	434
Joint . . . . .	435
Joint and Several . . . . .	435
Co-Trustees . . . . .	436
Assignees . . . . .	437
Co-Executors . . . . .	438
Firm . . . . .	439
Corporation . . . . .	440
Successors in Office . . . . .	440 A
Suspicious Circumstances . . . . .	441-445
Insufficient Funds . . . . .	446, 449
Legal Tender . . . . .	447, 448
Recalling Payments . . . . .	449
Order of Payment . . . . .	450
Payment by giving Credit . . . . .	451
Payment after the Bank is Insolvent . . . . .	452
Payment by Mistake . . . . .	454
Drawer's Suit for Dishonor . . . . .	458
Defences . . . . .	459
Possession of Paid Checks . . . . .	460
Payment of Checks on other Banks . . . . .	460 A

	SECTION
CHAPTER XXXIII. FORGERY OF CHECKS . . .	462-489
As between Bank and Drawer	
Forged Signature . . . . .	463-473
Forged Indorsement . . . . .	474
Fraudulent Alteration . . . . .	469, 480
As between Bank and True Owner . . . . .	474
As between Bank and Person receiving the Money . . . . .	463, 466-489
Time within which Discovery and Notice must be Consummated . . . . .	487-489
CHAPTER XXXIV. EFFECT OF A CHECK . . .	491-555
As an Assignment	
Between one Holder and Another . . . . .	497
Between the Holder and the Creditors of the Drawee Bank . . . . .	498
Between the Holder and the Drawer and his Creditors . . . . .	539-541
Conflict of Laws . . . . .	542
As Payment . . . . .	543
As a Gift . . . . .	548
Donatio Causa Mortis . . . . .	550
Inter Vivos . . . . .	551
As a Testamentary Document . . . . .	554
CHAPTER XXXV. PAYMENT OF NOTES AND ACCEPTANCE . . .	557-564
Duty to Pay . . . . .	557, 558
Note held by Bank . . . . .	559, 560
Rights of Indorsers . . . . .	562
CHAPTER XXXVI. TITLE TO DEPOSITS . . .	566-606
As between the Bank and Depositor . . . . .	566-589
As between Parties, neither of which is the Bank . . . . .	589
As between the Bank and Third Persons . . . . .	590-603
CHAPTER XXXVII. TITLE BY GIFT . . .	608-615
Inter Vivos . . . . .	608-610
Donatio Causa Mortis . . . . .	611, 612
CHAPTER XXXVIII. SAVINGS BANKS . . .	617-620
Nature . . . . .	617
Rules . . . . .	620
Pass-book . . . . .	619, 620
CHAPTER XXXIX. INSOLVENCY . . .	622-632 A
Definition . . . . .	622
Preferences . . . . .	623-627
Rights of Depositors . . . . .	628-631
Insolvency of Savings Banks . . . . .	632
Insolvency of Loan, Trust and Investment Companies . . . . .	632 A

**BILLS AND STOCK**

	SECTION
<b>CHAPTER XL. BANK BILLS</b> . . . . .	634-666
Issue . . . . .	634, 666
Bill-holder's Rights . . . . .	637-658
Transfer . . . . .	659-662
Forged Bills . . . . .	569
Warranty of Solvency . . . . .	662
 <b>CHAPTER XLI. STOCK AND STOCKHOLDERS</b> . . . . .	 668-720
Liabilities of Stockholders,	
As Subscribers . . . . .	668-674
Beyond Subscription . . . . .	675-696
Lien of a Bank on its Stock . . . . .	697-705
Shareholder's Rights . . . . .	706-717
Transfer of Stock . . . . .	709-714
The Bank as a Shareholder . . . . .	716
Sovereign States as Shareholders . . . . .	718
 <b>CHAPTER XLII. INFORMALITY, ULTRA VIRES, AND FOR- FEITURE</b> . . . . .	 723-764
 <b>CHAPTER XLIII. LEGISLATIVE CONTINUANCE OF THE COR- PORATION</b> . . . . .	 765
 <b>CHAPTER XLIV. DISSOLUTION</b> . . . . .	 766
 <b>CHAPTER XLV. LOAN, TRUST AND INVESTMENT COM- PANIES</b> . . . . .	 767-779

**PART II****NATIONAL BANKING LAWS**

National Banking Act, June 5, 1864 . . . . .	1-63
Act of 31 May, 1878 . . . . .	64
Act of 14 February, 1880 . . . . .	65
Act of 26 February, 1881 . . . . .	66
Act of 12 July, 1882 . . . . .	67-79
Act of 3 March, 1883 . . . . .	80
Act of 1 May, 1886 . . . . .	81
Acts of 3 March, 1887 . . . . .	82, 83
Act of 13 August, 1888 . . . . .	83 A
Act of 14 July, 1890 . . . . .	83 B
Act of 28 July, 1892 . . . . .	83 C
Act of 3 August, 1892 . . . . .	83 D
Act of 2 March, 1897 . . . . .	83 E
Act of 14 March, 1900 . . . . .	83 F
Act of 3 March, 1901 . . . . .	83 G
Act of 12 April, 1902 . . . . .	83 H

	SECTION
Full Text of the Laws of the United States relating to Banking, passed in 1874, 1875, and 1876 . . . . .	84
Act of 30 May, 1908 . . . . .	84 A
Federal Reserve Act . . . . .	85-199
Amendments to the Federal Reserve Act . . . . .	199 A-199 E
Cases upon their Construction . . . . .	200-300
 GENERAL INDEX . . . . .	 781-865
INDEX TO THE FEDERAL RESERVE ACT . . . . .	867-889



# BANKS AND BANKING

## CHAPTER XXXI

### PRESENTMENT OF CHECKS FOR PAYMENT

NOTICE OF DISHONOR, § 428. See a condensed statement of the general law of presentment, §§ 258, 259.

#### A. PERIOD OF PRESENTMENT.

The fundamental rule is, that presentment must be made within a reasonable time under all the circumstances.

- § 421. In the absence of agreement or special circumstances, usage, now recognized as law, has fixed the rule that presentment must be made within banking hours of the first business day following the delivery of the check, if the bank is in the place where the payee lives or does business; if not in the same place, then the check must be forwarded for collection upon the business day following the day of receiving the check. If a check is received on Sunday, or other non-secular day, then the business day following is considered the day of receipt.

#### SPECIAL CIRCUMSTANCES.

- § 421 *i.* (1) Hastening.  
(a) If the payee knows that the drawee bank is in a failing condition, it is his duty to present as soon as, by ordinary diligence, is possible, and not to wait till the next day.  
(b) An agent for collection must present the check the same day it is received, not in order to hold the drawer of the check, but to hold the indorsers, etc. on the paper collected. See § 428.
- § 421 *a.*
- (2) Excusing delay.
- § 423. Infrequent mail.  
Draft intended to circulate.  
Distance from bank.
- § 424. Clearing-house usages, and a usage of merchants to do business with reference to the clearing-house.

#### B. HOLDER *v.* DRAWER.

- § 421. In order to hold the drawer absolutely, presentment must be made within the period set forth in A above, unless circumstances dispense with demand altogether; and it

makes no difference through how many hands the check may go, the presentment must be made within this period in order to hold the drawer, whether it be made by the first or the hundredth holder.

§ 421 *d.* But delay in presentment will only discharge the drawer so far as he is actually damaged by it.

§ 425. At some time before suit against the drawer presentment must be made, unless dispensed with.

Circumstances dispensing with presentment altogether before suit.

(1) Agreement to waive formalities, express or implied, from conduct or words.

(2) Part payment by drawer before or after check is due.

(3) Bank's insolvency or stoppage, or an injunction upon it.

(4) If drawer had no funds. § 421.

(5) When check is given as evidence of loan.

§ 426. The first presentment for payment will be a discharge of the drawer, if the bank offers to pay and the holder refuses; but presentment for inquiry as to signature merely will not have this effect.

C. HOLDER *v.* INDORSER.

§ 421. As between each indorser and subsequent parties, the same period

§ 422. for presentment is allowed, measured from the contract of indorsement, but with the difference that unexcused failure to present within the standard time absolutely discharges the indorser, whether he is injured by the delay or not (*Massachusetts*, however, holding that an indorser, like the drawer, is bound if not prejudiced by delay).

§ 427. D. PRESENTMENT BY MAIL.

§ 421. **Period of Presentment.** — **Holder *v.* Drawer.** — In the absence of agreement or special circumstances it is the right of the drawer of a check to expect it to be presented for payment at latest within banking hours on the day following the day of its delivery to the payee, if the bank on which it is drawn be in the same place where the payee lives or does business; if the bank be not in such place, then the check must, within the same time, be put in due course for presentment, either by being sent by mail to the drawee, or by being deposited for collection with a banker, according to the ordinary custom of such business in that place.<sup>1</sup> But the

<sup>1</sup> § 421. *Simpson v. Pacific Mutual Life Ins. Co.*, 44 Cal. 139; *Cromwell v. Lovett*, 1 Hall (N. Y.) 56; *Veazie Bank v. Winn*, 40 Me. 62; *Boddington v. Schlenker*, 1 Nev. & M. 540; s. c. 4 B. & Ad. 752; *Moule v. Brown*, 4 Bing. N. C. 266; *Smith v. Janes*, 20 Wend. (N. Y.) 192; *O'Brien v. Smith*, 1 Black 99; *Smith v. Miller*, 43 N. Y. 171, 176; *Taylor v. Sip*, 1 Vroom (N. J.) 284; *Ritchie v. Bradshaw*, 5 Cal. 228; *Bickford v. First National Bank of Chicago*, 42 Ill. 238; *Strong v. King*, 35 Ill. 9; *Wear v. Lee*, 87 Mo. 358; *Cawein v. Browinski*, 6 Bush (Ky.) 457; *Himmelmänn v. Hotaling*, 40 Cal. 111; *Schoolfield v. Moon*, 9 Heisk. (Tenn.) 171; *Kelty v. Second National Bank*, 52 Barb. (N. Y.) 328; *Syra-*

holder does not gain an extra day for presentment by depositing the check in his bank for collection. If the payee of the check receive it on Monday and deposit it in his bank, presentment must still be made in the same place, or the check forwarded to any other place where the drawee bank is, by the payee's bank (as by himself) during banking hours on Tuesday.<sup>2</sup>

*An Agent Taking a Check must Present the Same Day, if Possible by Reasonable Diligence*

(a) When a check is taken instead of money by one acting for others, a delay of presentment for a day, or for any time beyond that within which by reasonable diligence it can be presented, is at the peril of the party so retaining the check, as between him and the true owners and parties in interest represented by him. Thus where the payee of a draft took from the drawees their check for the amount, which during banking hours on that day would have been honored, but which was retained by the payee until the day following, when it was dishonored, it was held that the payee could not have any remedy against the drawer. As between the payee and the drawee the presentment of the check had been made with due promptitude; but as between the payee and the drawer there had been laches by reason of the payee not having presented the check and reduced it to money on the same day on which he received it. The payee had in fact, so far as the drawer was concerned, given to the drawees an extension of credit for one day, and the payment had been lost directly in consequence of such unauthorized extension.<sup>3</sup> (See § 428.)

cuse, Bing. & N. Y. R. Co. v. Collins, 57 N. Y. 641; Gifford v. Hardell, 88 Wis. 538, 60 N. W. 1064; Lloyd v. Osborne, 92 Wis. 93, 65 N. W. 859; Grange v. Reigh, 93 Wis. 552, 67 N. W. 1130; Holmes v. Roe, 62 Mich. 199, 28 N. W. 864; Hamilton v. Lumber Co., 95 Mich. 436, 54 N. W. 903; McDonald v. Mosher, 23 Ill. App. 206; Industrial Trust & Title Co. v. Weakley, 103 Ala. 463, 15 So. 854 (1893); Morris v. Eufaula National Bank, 106 Ala. 387, 18 So. 11 (1894); Cox v. Citizens' State Bank, 73 Kan. 789, 85 Pac. 762 (1906); Furber v. Dane, 102 Mass. 108, 89 N. E. 227 (1909); Brown v. Schintz, 98 Ill. App. 452 (1901); Turner v. Kimball, 37 Okla. 92, 130 Pac. 563 (1913); Kennedy v. Jones, 140 Ga. 302, 78 S. E. 1069, 1914D Ann. Cas. 355, n.

But in the absence of special circumstances or some special custom the holder of a check is not required to present it for payment after banking hours. Temple v. Carroll, 75 Neb. 61, 105 N. W. 989 (1905).

<sup>2</sup> Alexander v. Burchfield, 1 Carr. & M. 75; s. c. 7 Man. & Gr. 1061.

<sup>3</sup> Smith v. Miller, 43 N. Y. 171; Chouteau v. Rowse, 56 Mo. 65; Anderson v. Gill, 79 Md. 313. See Noble v. Doughten, 72 Kan. 336, 83 Pac. 1048, 3 L. R. A. (n. s.) 1167, n. (1905).

*Reasonable Time a Question of Fact in Each Case*

(b) 1. All drafts foreign or inland must be presented to the drawee within a reasonable time, and in case of non-payment prompt notice must be given to the drawer and indorsers. What is a reasonable time depends on the circumstances of each case and is sometimes a very difficult question.<sup>4</sup> The relations of the parties, the time, mode, and place of receiving the check, must be considered,<sup>5</sup> and whether the check is post-dated or not.

† The presumption is that a check would have been paid if diligently presented.<sup>5a</sup> And what is due diligence is, as a general rule, a question for the jury.<sup>5b</sup>

(c) 2. The drawer<sup>6</sup> cannot (except by agreement or under special circumstances as above) be held absolutely beyond the business hours of the day following his delivery of the check, if the bank is in the same place, or if the bank is in another place, the period of his liability will be until the close of business hours on the first secular day following the receipt of the check by some one in the bank's locus, the check having been mailed upon the day following its delivery by the drawer.<sup>7</sup> This period of absolute liability cannot be extended by circulating the paper; the tenth holder cannot hold the drawer unless he presents within this period measured from the delivery by the drawer, and not from his own receipt of the check, any more than the first holder.

<sup>4</sup> *Montelius v. Charles*, 76 Ill. 303; *Stevens v. Park*, 73 Ill. 387; *Mohawk Bank v. Broderick*, 10 Wend. (N. Y.) 307; *Allen v. Kramer*, 2 Brad. (Ill.) 209; *National State Bank v. Weil*, 141 Pa. St. 457, 21 Atl. 661, citing *Muncy Bor. Sch. D v. Commonwealth*, 84 Pa. St. 464; *Babcock v. Rocky Ford*, 25 Colo. App. 312, 137 Pac. 899 (1913); *Lewis etc. Co. v. Montgomery Supply Co.*, 59 W. Va. 75, 52 S. E. 1007, 4 L. R. A. (N. s.) 135 (1906); *Plover Savings Bank v. Moodie*, 135 Iowa 685, 110 N. W. 29 (1906).

<sup>5</sup> *Woodruff v. Plant*, 41 Conn. 344; *National Bank State v. Weil*, 141 Pa. St. 457, 21 Atl. 661, citing *Muncy Bor. Sch. D v. Commonwealth*, 84 Pa. St. 464; *Babcock v. Rocky Ford*, 25 Colo. App. 312, 137 Pac. 899 (1913); *Lewis etc. Co. v. Montgomery Supply Co.*, 59 W. Va. 75, 52 S. E. 1007, 4 L. R. A. (N. s.) 135 (1906).

<sup>5a</sup> *Watt v. Gans & Co.*, 114 Ala. 264, 21 So. 1011 (1896). See *Kennedy v. Jones*, 140 Ga. 302, 78 S. E. 1069, 1914D Ann. Cas. 355, n.

<sup>5b</sup> *Tomlin v. Thornton*, 99 Ga. 585, 27 S. E. 147 (1896).

<sup>6</sup> See Collection, § 213, and cases below.

<sup>7</sup> *Werk v. Mad River Valley Branch Bank*, 8 Ohio St. 301; *Bickerdike v. Bollman*, 1 Term 405; *First National Bank v. Buckhannon Bank*, 80 Md. 475, 31 Atl. 302.

*The Drawer is Discharged by Delay only so far as Damaged by It*

(d) While failure to present within this period discharges indorser absolutely <sup>7a</sup> (see § 422), the drawer is released only so far as damaged.<sup>8</sup> Though the drawer has the right to expect presentment for payment to be made within the period aforesaid, yet his obligations will be affected by a breach of this duty only under peculiar circumstances. The check which he delivers is only a means whereby he seeks to enable the payee to obtain payment. As a general rule, it does not acquit him of his indebtedness, but is only evidence of that indebtedness. It may be held, therefore, for any indefinite period, short of the running of the Statute of Limitations, by the payee or by any subsequent assignee, and if not ultimately paid by the bank upon presentment and

<sup>7a</sup> *Comer v. Dufour*, 95 Ga. 378, 22 S. E. 543 (1894).

<sup>8</sup> *Syracuse, Bing. & N. Y. R. Co. v. Collins*, 3 Lans. (N. Y.) 32; 57 N. Y. 641; *Scott v. Meeker*, 20 Hun (N. Y.) 161; *Beeching v. Gowe*, 1 Holt 313; *Church v. Farnham*, 1 Sheld. (N. Y.) 393; *Woodin v. Frazee*, 38 N. Y. (Sup. Ct.) 190; *Warrensburg Co-operative Building Association v. Zoll*, 83 Mo. 94; *Cogswell v. Rockingham Ten Cents Savings Bank*, 59 N. H. 43; *Comer v. Dufour*, 95 Ga. 378, 22 S. E. 543 (1894), citing *Daniels v. Kyle*, 1 Ga. 304; *Industrial Bank v. Bowes*, 165 Ill. 70, 46 N. E. 10, reversing *Bowes v. Industrial Bank*, 64 Ill. App. 300; *Maddersom v. De Young*, 35 Ill. App. 588; *First National Bank v. Buckhannon Bank*, 80 Md. 475, 31 Atl. 302; *Marshall v. Freeman*, 52 Ill. App. 42; *Merritt v. Gate City National Bank*, 100 Ga. 147, 27 S. E. 979 (1896); *Bowen v. Needles National Bank*, 87 Fed. 430 (1898); *Brown v. Schintz*, 98 Ill. App. 452 (1901); *Rosenbaum v. Hazard*, 233 Pa. St. 206, 82 Atl. 62, 1913 Ann. Cas. 1291, n., 38 L. R. A. (N. S.) 255, n.; *Pickett v. Baird Investment Co.*, 22 N. D. 343, 133 N. W. 1026 (1911); *State Bank of Gothenburg v. Carroll*, 81 Neb. 484, 116 N. W. 276 (1908).

Where the bank suspended payment on the day following delivery of the check, the holder recovered from the drawer, though the check was not presented until nearly five months after date. *Morrison v. McCartney*, 30 Mo. 183.

No negligence of holder is a defense if the drawee made no provision to meet the check or has withdrawn his funds. *Linville v. Welch*, 29 Mo. 203; *Adams v. Darby*, 28 Mo. 162; *Moody v. Mack*, 43 Mo. 210.

The burden is on the holder to show that the drawer has suffered no loss by the delay. *Little v. Phoenix Bank*, 2 Hill (N. Y.), 425. See *Stevens v. Park*, 73 Ill. 387; *Griffin v. Riblet*, 6 N. Y. Leg. Obs. 421; *Gregg v. George*, 16 Kan. 546; *Mordis v. Kennedy*, 23 Kan. 408; *Jones v. Heiliger*, 36 Wis. 149 (1874); *Henshaw v. Root*, 60 Ind. 220 (1877); *Griffin v. Kemp*, 46 Ind. 172; *Hamlin v. Simpson*, 105 Iowa 125, 74 N. W. 906 (1898); *McClain v. Lowther*, 35 W. Va. 297, 13 S. E. 1003 (1891). *Contra*, *Rosenbaum v. Hazard*, 233 Pa. St. 206, 82 Atl. 62, 1913 Ann. Cas. 1291, n., 38 L. R. A. (N. S.) 255 n. (Loss is a matter of defence.)

demand, it still remains as evidence of the unsatisfied debt.<sup>9</sup> This rule is subject only to one limitation; viz., that, if by the delay in presentment the drawer has suffered any injury, he shall be absolved at least to the extent of such injury. The most natural form for such injury to take is where the insolvency of the bank, intervening between the proper time of presentment and the actual time of presentment, has caused the dishonor of a check which would otherwise presumably have been duly paid upon demand.<sup>10</sup> Where the drawers withdrew their deposit on the 10th, the bank failing afterward on the same day, the drawers were held to pay a check drawn on the 2d, though the funds had been sufficient all the mean time.<sup>11</sup>

(e) The true doctrine is that the check-holder has a right to the deposit wherever it goes, equal to that of the other creditors of the bank, and only subordinate to the right of a *bona fide* purchaser for value obtaining priority by possession or presentment.

### *Burden of Proof*

(f) The burden of proof on the holder to show that the drawer was not injured by delay is shifted, if it is shown that the drawer withdrew the funds, or that the drawee was solvent at the time of presentment.<sup>12</sup>

<sup>9</sup> *Cruger v. Armstrong*, 3 Johns. Cas. (N. Y.) 5; *Conroy v. Warren*, *id.*, 259; *Murray v. Judah*, 6 Cow. (N. Y.) 490; *Mohawk Bank v. Broderick*, 10 Wend. (N. Y.) 306; 13 *id.*, 133; *Little v. Phoenix Bank*, 2 Hill (N. Y.) 425; *Pack v. Thomas*, 13 S. & M. (Miss.) 11; *Harbeck v. Craft*, 4 Duer (N. Y.) 122; *Bickford v. First National Bank of Chicago*, 42 Ill. 238; *People's State Bank v. Brown*, 80 Kan. 520, 103 Pac. 102, 23 L. R. A. (N. S.) 824 (1909); *Robinson v. Hawksford*, 9 Q. B. 52; *Mullick v. Radakissen*, 28 Eng. L. & Eq. 94; *Alexander v. Burchfield*, 7 M. & G. 1061; *Serle v. Norton*, 2 Moody & R. 401; *Laws v. Rand*, 3 C. B. N. S. 442; *Story on Promissory Notes*, Sharswood's ed., pp. 680, 683; *Daniel*, Neg. Inst., § 1587.

<sup>10</sup> *Willets v. Paine*, 43 Ill. 433; and cases in preceding note; *Watt v. Gans & Co.*, 114 Ala. 264, 21 So. 1011 (1896); *Anderson v. Rodgers*, 53 Kan. 542, 36 Pac. 1067 (1894), citing *Bank of Lindsborg v. Ober & Hageman*, 31 Kan. 599, 3 Pac. 324. See *Noble v. Doughten*, 72 Kan. 336, 83 Pac. 1048, 3 L. R. A. (N. S.) 1167, n. (1905).

<sup>11</sup> *Kinyon v. Stanton*, 44 Wis. 479 (1878).

<sup>12</sup> *Planters' Bank v. Merritt*, 7 Heisk. (Tenn.) 177; *McClain v. Lowther*, 35 W. Va. 297, 13 S. E. 1003 (1891).

The drawer must show that the delay in forwarding and protesting caused his loss, before he can defeat recovery by a *bona fide* holder. The same is true in regard to protest and non-payment. *Cox v. Citizens' State Bank*, 73 Kan. 789, 85 Pac. 762 (1906).

*Protest*

(g) A dishonored check need not be protested to bind the drawer.<sup>13</sup> And so where the drawer has insufficient funds.<sup>13a</sup>

*No Funds*

(h) If the drawer has no funds at the date of the check, or at the date of presentment, the drawer remains liable notwithstanding the lapse of time.<sup>14</sup> Neither delay in presentment or notice releases the drawer, for he is not in such cases injured by it. To relieve the drawer when he has withdrawn the funds would be to allow him to keep both the deposit and the consideration of his check, and thus take advantage of his own wrong;<sup>15</sup> and to release him when he had no funds in the first place would enable him to make money by fraud, and give him the consideration of the check, when he has rendered no equivalent nor taken any risk on account of it. If the drawer stop payment of the check, he is not entitled to notice of non-payment.<sup>16</sup>

(i) Neglect of the holder to present a check on the very day of its drawing is no defense to the maker, *unless the holder knew the bank was in a precarious condition*.<sup>17</sup> And even then, in the absence of special circumstances or special custom the holder is not required

<sup>13</sup> *Henshaw v. Root*, 60 Ind. 220; *Griffin v. Kemp*, 46 Ind. 172; *Culver v. Marks*, 122 Ind. 554, 23 N. E. 1086; *Industrial Trust, Title & Saving Co. v. Weakley*, 103 Ala. 464, 15 So. 854 (1893); *Beauregard v. Knowlton*, 156 Mass. 395, 31 N. E. 389 (1892); *Thorn v. Sinsheimer*, 66 Ill. App. 555; *First National Bank v. Lum. Co. Bank*, 30 Or. 296 (1897).

<sup>13a</sup> *Industrial Trust, Title & Saving Co. v. Weakley*, 103 Ala. 464, 15 So. 854 (1893); *Grant v. MacNutt*, 66 N. Y. 719.

<sup>14</sup> *Foster v. Paulk*, 41 Me. 428; *Shaffer v. Maddox*, 9 Neb. 205; *Sterrett v. Rosencrantz*, 3 Phila. 54; *Fitch v. Redding*, 4 Sand. (N. Y.) 130; *Bell v. Alexander*, 21 Gratt. (Va.) 1; *Case v. Morris*, 31 Pa. St. 100, 104; *Fletcher v. Pierson*, 69 Ind. 281; *Bond v. Farnham*, 5 Mass. 170; *Franklin v. Vanderpool*, 1 Hall (N. Y.) 78; *People's State Bank v. Brown*, 80 Kan. 520, 103 Pac. 102, 23 L. R. A. (N. S.) 824 (1909).

<sup>15</sup> *Moody v. Mack*, 43 Mo. 210; *Deener v. Brown*, 1 MacArthur (D. C.) 350.

<sup>16</sup> *Purchase v. Mattison*, 6 Duer (N. Y.) 587.

<sup>17</sup> *First National Bank of Charlotte v. Alexander*, 84 N. C. 30 (1881); *Nebraska National Bank v. Logan*, 35 Neb. 182, 52 N. W. 808 (1892).

When failure of a bank, holding a check as indorsee, to present it for payment is predicated on some act or omission of one of its agents having authority to make presentation, it is not excused by the fact that such agent was ignorant of the existence of the check. *Temple v. Carroll*, 75 Neb. 61, 105 N. W. 989 (1905).

to present it after banking hours.<sup>17a</sup> A collecting bank retaining a check four days was held liable for the loss consequent, and the depositor's subsequent promise to pay the amount was *nudum pactum*.<sup>18</sup> A holder who retains a check after it is refused payment, and fails to notify the drawer, must shoulder the loss himself.<sup>19</sup> Delay of seven days in presentation of a debtor's check discharged the surety.<sup>20</sup> A company's treasurer must present a check received from the State within a reasonable time, like any other holder, or bear the loss.<sup>21</sup> Forty days in this case intervened between the reception of the check and the bank's insolvency.

Defendants drew a check in Philadelphia, where they resided, on a bank of that city. The plaintiff, who was payee of the check, lived in New York. The check was delivered to the plaintiff's agent in Philadelphia on May 5, and on that afternoon the agent returned to New York, delivering the check to his principal after the close of banking hours. On May 6, the check was placed in a bank for collection and was forwarded on May 7 to the bank's Philadelphia correspondent. It was received and presented about noon on May 8, but the drawee bank had already closed its doors, and the check was not paid. *Held*, that the plaintiff had used due diligence.<sup>22</sup>

A bank in Aberdeen, Miss., made a collection on the 7th inst., and remitted to its customer at Nashville, Tenn., its New York check. The check was received on the 19th, and presented in New York on the 22d. The drawer failed on the 18th. *Held*, that the draft was presented in due time, and it will not avail to show that it would have been paid if presented on the 18th.<sup>23</sup>

**§ 422. Indorser absolutely Discharged by Unexcused Delay beyond the above Period, though not Prejudiced thereby; Massachusetts contra as to the last Clause.** — The rule as to presentment, as between the holder and the drawer of the check, is different in one respect from the rule as to presentment as between the holder and an indorser. For whereas presentment may be de-

<sup>17a</sup> *State Bank of Gothenburg v. Carroll*, 81 Neb. 484, 116 N. W. 276 (1908).

<sup>18</sup> *Bank of Greensboro v. Clapp*, 76 N. C. 482 (1879).

<sup>19</sup> *Clark v. National Metropolitan Bank*, 2 MacArthur (D. C.) 249 (1875).

<sup>20</sup> *Fegley v. McDonald*, 89 Pa. St. 128 (1879).

<sup>21</sup> *State v. Gates*, 67 Mo. 139.

<sup>22</sup> *Rosenthal v. Ehrlicher*, 154 Pa. St. 346, 26 Atl. 435.

<sup>23</sup> *Kinney & Co. v. Paine*, 68 Miss. 258, 8 So. 847 (1890). See also *First National Bank v. Buckhannon Bank*, 80 Md. 475, 31 Atl. 302.



layed for almost any length of time, and the drawer may still be held if he has suffered no prejudice by reason of the delay, on the other hand an unreasonable delay<sup>0</sup> will discharge the indorser, even though he does not appear to have suffered any prejudice thereby. It was so held in the case of the Mohawk Bank *v.* Broderick, where the delay was from January 14 to February 6, there being a daily mail between the place where the check was delivered and the place where the drawee bank was established. Yet it appeared that the check would not have been paid had it been duly presented, since the drawer's account was then overdrawn, and continued so thereafterward until the presentment; nor was the drawer solvent at the time when the check was dated. The only intimation that the indorser might have suffered any loss by reason of the delay is to be sought in the statement that, though the drawer was insolvent at the date of the check, yet no other of his debts were due at this time. It is conceivable, therefore, that had the check been duly presented, and notice of dishonor duly given to the indorser, he might have exacted payment even from the insolvent drawer. But though this circumstance is noted in the statement of facts, it is not adverted to by the court in their opinion and cannot be presumed to have formed the basis of that opinion. On the contrary, the opinion is based, both in the Supreme Court and afterward in the Court of Errors, upon the broad statement of the principle of law, that the indorser of a check is discharged by unreasonable delay in presentment.<sup>1</sup> It is not to be supposed that the indorser intends to assume a liability indefinite as to time, and that he contemplates that the check will remain in circulation, keeping his responsibility alive for a period and circumstances not known to him and not anticipated when the liability was undertaken.<sup>2</sup>

This case followed the earlier case of *Murray v. Judah*,<sup>3</sup> wherein Judge Sutherland had remarked, "As between the holder of a check and an indorser or third person, payment must be demanded within a reasonable time", — contradistinguishing this from the case as between the holder and drawer.

An indorser has a right to demand and notice within the same

<sup>0</sup> § 422. The question of the reasonableness of delay in presenting a check for payment is ordinarily for the jury. *West Branch State Bank v. Haines*, 135 Iowa 313, 112 N. W. 552 (1907). See *Plover Savings Bank v. Moodie*, 135 Iowa 685, 110 N. W. 29, 113 N. W. 476 (1907).

<sup>1</sup> *Mohawk Bank v. Broderick*, 10 Wend. (N. Y.) 304; s. c. in the Court of Errors, 13 *id.*, 133.

<sup>2</sup> *Little v. Phoenix Bank*, 2 Hill (N. Y.) 425.

<sup>3</sup> *Cow*. (N. Y.) 484.

period as the drawer, but measured from the issue of the check by the indorser, and, unlike the drawer, the indorser is absolutely discharged by failure.<sup>4</sup> The indorser of a check drawn for his own accommodation is really the primary party; he is the one who should provide funds to pay the check, and he may be held without notice of non-payment unless injured by the neglect.<sup>5</sup>

A draft wherein some unknown person had altered the date, name of payee, and amount, was presented for sale at a bank by a stranger, accompanied by P., who wrote his name thereon as an accommodation indorser. The bank bought the draft. In an action by the bank against P.'s executor, *held*, that P. had the rights of an indorser, and in absence of notice and demand was not chargeable.<sup>6</sup>

In Massachusetts, however, a contrary doctrine has been asserted, and the right of the indorser has been limited to having presentment made within such a period that he does not appear to have suffered loss by the delay.<sup>7</sup> But who can ever say with certainty, that the indorser has not suffered such loss? In the case at bar it was assumed that he had not, because the check was not good at the time he indorsed. But he then supposed it to be good, and had he speedily learned (as he would have done in case of diligent presentment and notice) that it was bad, it is impossible to say, and certainly is not for the court to undertake to say, that he might not have taken some steps to save himself.

The indorsement of a duplicate check does not change the indorser's relation to the original or create any liability on the duplicate different from the original. And when the holder of a check did not discover its loss until several months after he acquired it and then received a duplicate check from the drawer and had it indorsed the same as the original, the court held that the loss, mislaying or destruction of a check did not dispense with a regular presentment for payment and that the indorser, having been discharged from liability upon the original by laches as to presentment, could not be held liable on the duplicate.<sup>8</sup>

<sup>4</sup> *Aymar v. Beers*, 7 Cow. (N. Y.) 705; *Comer v. Dufour*, 95 Ga. 379, 22 S. E. 543 (1896); *First National Bank v. Miller*, 37 Neb. 500, 55 N. W. 1064 (1893).

<sup>5</sup> *Williams v. Hood*, 1 Phila. 205.

<sup>6</sup> *Susquehanna Valley Bank v. Loomis*, 85 N. Y. 207.

<sup>7</sup> *Small v. Franklin Mining Co.*, 99 Mass. 277.

<sup>8</sup> *Lewis v. Commercial National Bank*, 37 Tex. Civ. App. 241, 83 S. W. 423 (1904).

§ 423. **Special Circumstances excusing Delay.**<sup>0</sup> — A. received a check on Wednesday; the first mail closed Thursday morning at 7½ A.M. (that was held an unseasonable hour at that time of year, February 23) and the next one went Saturday morning, arriving in Wheeling, where the check was payable, between 11 and 12 A.M. The bank failed Saturday noon. *Held*, that the payee was not bound to mail by the Thursday post, nor to cause the check to be presented before noon on Saturday, as if sent to a bank to collect by the Saturday mail they would not probably have presented it before noon, that being some time before the regular closing hour on Saturday.<sup>1</sup> (See § 425.)

A draft issued by a New York bank, and intended to circulate as money, was given to a ticket agent on deposit to secure certain excursion tickets until the depositor could decide whether or not he wished to go. The deposit was on the 9th, the excursion was to start on the 14th, and the agent forwarded the draft on the 15th, the morning after the decision was notified to him and the tickets bought. *Held*, that the delay was not unreasonable under the circumstances, and did not discharge the indorser, although in the case of private drafts not intended to circulate as money such delay would be unreasonable.<sup>2</sup>

If the condition of the country, removal of bank, or other matter, prevent due presentment, the holder should notify the drawer, and offer to return check.<sup>3</sup>

Friday afternoon a small check was given to F., twenty miles from the bank. F. had to be at his business, twenty-seven miles the other way, on Saturday, so did not leave the check for collection till Monday. The drawee failed early on Monday. *Held*, the delay did not discharge the debt for which the check was given.<sup>4</sup> An Iowa case holds that a check received by a payee sixteen and three-quarters miles from the drawee bank should be presented in the ordinary course of business, at the latest, on the second day after its receipt.<sup>4a</sup> If the holder is disabled, he may yet present

<sup>0</sup> § 423. If the drawee bank has suspended and the parties did not intend the check to be presented and knew that if presented it would not be paid, no rights are lost by failure to present. *Commercial Bank v. Hardy*, 97 Miss. 755, 53 So. 395 (1910).

<sup>1</sup> *Cox v. Boone*, 8 W. Va. 500.

<sup>2</sup> *Nutting v. Burked*, 48 Mich. 241, 12 N. W. 184 (1882).

<sup>3</sup> *Purell v. Allemong*, 22 Gratt. (Va.) 739.

<sup>4</sup> *Freiberg v. Cody*, 55 Mich. 108, 20 N. W. 813.

<sup>4a</sup> *Hamlin v. Simpson*, 105 Iowa 125, 74 N. W. 906 (1898).

by mail.<sup>5</sup> A verbal agreement between drawer and payee, at time of execution and delivery of a check, that it shall not be presented till a certain time, excuses delay till such time.<sup>6</sup>

§ 424. **The Clearing-house has not in general changed the Rules of Presentment. But Usage is beginning to assert a Variation in Favor of Clearing-house Routine.** — The drawer of a check, after demand upon the drawee and refusal, is not discharged because of failure to present the check at the clearing-house, in accordance with mercantile usage, although, had it been so presented, it would have been paid.<sup>1</sup>

A custom among banks to do business through the clearing-house does not do away with the necessity of presenting a check to the bank on which it is drawn, at least during banking hours of the next succeeding day,<sup>2</sup> or within a reasonable time.<sup>2a</sup>

Where a bank receiving a check for collection presented it to the bank on which it was drawn for payment through the clearing-house the presentation and acceptance through the clearing-house did not bind the bank on which it was drawn and the payee could not maintain an action against it for failure to pay the check.<sup>2b</sup>

(a) **But by Local Usage in Maine and Pennsylvania** it seems that the usage of business by which checks received are deposited in the bank of the merchant receiving them on the day of reception if possible, but if the bank is closed then on the day following, the depository collecting each day through the clearing-house all checks deposited upon the day preceding, is reasonable, uniform, and so general as to be presumably known; and drawers of checks are held to contract in reference to this usage,<sup>3</sup> and are therefore not relieved until the second day after delivery, unless such delivery is early enough in the day to allow of depositing the check that same day by ordinary diligence.

This seems eminently reasonable and just, and will soon be recognized as law, we have no doubt; though in Missouri it is held

<sup>5</sup> *Bell v. Alexander*, 21 Gratt. (Va.) 1.

<sup>6</sup> *Pollard v. Bowen*, 57 Ind. 232 (1877).

<sup>1</sup> § 424. *Kleekamp v. Meyer*, 5 Mo. App. 444 (1878).

<sup>2</sup> *Rosenblatt v. Haberman*, 8 Mo. App. 486 (1880).

<sup>2a</sup> *First National Bank v. Miller*, 37 Neb. 500, 55 N. W. 1064 (1893).

<sup>2b</sup> *Hentz v. National City Bank*, 159 App. Div. 743 (1913), 144 N. Y. S. 979.

<sup>3</sup> *Marrett v. Brackett*, 60 Me. 527; *Williams v. Gilman*, 3 Greenl. (Me.) 276; *Leach v. Perkins*, 17 Me. 462; *Loux v. Fox*, 171 Pa. St. 68, 33 Atl. 190; *Willis & Co. v. Finley*, 173 Pa. St. 28, 34 Atl. 213.

that the custom of banks to do business through the clearing-house cannot affect the period of presentment.<sup>4</sup>

§ 425. **Presentment is necessary at some Time before Suit against Drawer, unless it would be useless, or is waived.** — The payee, by receiving the check, impliedly binds himself to have presentment duly made before resorting to any other means of procuring or compelling payment. Accordingly, it has been held that a creditor accepting a check will not be permitted to maintain an action against the drawer upon the original debt until after he has caused the check to be properly presented at the bank and payment demanded;<sup>5</sup> and also, it is said, has caused the drawer to be notified of the dishonor.<sup>1</sup>

Presentment, however, may be altogether dispensed with, provided that, if made, it could not at the time be legally and properly met by the bank with a payment.<sup>2</sup> For example, it seems that knowledge of the banker's bankruptcy and stoppage,<sup>3</sup> or a public and notorious injunction, issued against the bank under a statute providing for the winding up of insolvent banks,<sup>4</sup> will excuse non-presentment. Neither need notice of dishonor be given to the drawer where the refusal to pay is made because the drawer has no funds in the bank.<sup>5</sup> Though it would seem reasonable that it should be shown that he had no reason to expect that there would be funds there.<sup>6</sup>

<sup>4</sup> *Rosenblatt v. Haberman*, 8 Mo. App. 486; *Davis v. Benton*, 2 West. L. Mo. 434.

<sup>5</sup> § 425. *Star Cutter Co. v. Smith*, 37 Ill. App. 212; *Petrue v. Wakem*, 99 Ill. App. 463 (1902); *First National Bank v. McConnell*, 103 Minn. 340, 114 N. W. 1129, 123 Am. St. Rep. 336, 14 L. R. A. (N. S.) 616, n. (1908).

<sup>1</sup> *Cromwell v. Lovett*, 1 Hall (N. Y.) 56; *Murray v. Judah*, 6 Cow. (N. Y.) 484; *Gough v. Staats*, 13 Wend. (N. Y.) 549; also the cases below, by establishing exceptions to the general rule, acknowledge its correctness. *Hamlin v. Simpson*, 105 Iowa 125, 74 N. W. 906 (1898).

<sup>2</sup> *Conroy v. Warren*, 3 Johns. Cas. (N. Y.) 259; *Mohawk Bank v. Broderick*, 10 Wend. (N. Y.) 304; 13 *id.*, 133; *Gough v. Staats*, 13 *id.*, 549; *Daniels v. Kyle*, 1 Kelly (Ga.) 304; *Elting v. Brinkerhoff*, 2 Hall (N. Y.) 459.

<sup>3</sup> *Camidge v. Allenby*, 6 B. & C. 373, explained in *Robson v. Oliver*, 10 Q. B. 704. But Grant says that even in such case presentment is customary: Grant on Banking, ed. 1873, p. 74; and see *In re East of England Banking Co.*, 4 L. R. Ch. 14.

<sup>4</sup> *Cromwell v. Lovett*, 1 Hall (N. Y.) 56.

<sup>5</sup> *Morse v. Massachusetts National Bank*, 1 Holmes (C. C.) 209; *Carew v. Duckworth*, L. R. 4 Exch. 313.

<sup>6</sup> *Carew v. Duckworth*, L. R. 4 Exch. 313; Grant on Banking, ed. 1873, p. 105.

Part payment by the drawer before or after the check becomes due makes it unnecessary to make demand on the bank before bringing suit. But the holder cannot evade demand by voluntarily giving credit for a part payment, unless the drawer accepts and admits such credit.<sup>7</sup>

*Demand may be Waived*

Regular presentation may be waived by conduct or representations; <sup>8</sup> any agreement, express or implied, will excuse want of the usual formalities.<sup>9</sup> Agreement that check shall be sent to another place to be cashed may enlarge the time of presentment; a reasonable time under the circumstances will be allowed.<sup>10</sup> A check given as evidence of a loan to the drawer need not be presented to the drawee.<sup>11</sup> A loan was made, and instead of an ordinary note or receipt a check was given for the amount, and was indorsed by a third party, who had knowledge of the character of the transaction, and wrote, besides his name, the words "waiving demand and notice"; it was held that the indorser was liable, although about thirteen months elapsed between the issuing of the check and its presentment for payment, during which interval the maker had become insolvent.<sup>12</sup>

Where a bank receives a check for collection, and has knowledge that the drawee bank has suspended payment, the fact that the drawee resumes payment for a day without knowledge or means of knowledge on the part of the collecting bank, there is no duty to make presentment on the day of resumption of payments.<sup>13</sup>

Where the payee of a check does not present it for three months, and in the interim the drawee dies insolvent, the fact that the

<sup>7</sup> *Levy v. Peters*, 9 Serg. & Raw. (Pa.) 125.

<sup>8</sup> *Compton v. Gilman*, 19 W. Va. 316; *Devendorf v. West Virginia Oil Land Co.*, 17 W. Va. 135; *Franklin v. Vanderpool*, 1 Hall (N. Y.) 78.

Presentation may be dispensed with by statute, when the drawer has no right to expect or require the drawee to pay. *West Branch State Bank v. Haines*, 135 Iowa 313, 112 N. W. 552 (1907).

<sup>9</sup> *Holmes v. Roe*, 62 Mich. 199, 28 N. W. 864; *Woodruff v. Plant*, 41 Conn. 344; *Gray v. Anderson*, 99 Iowa 342, 68 N. W. 790 (1896); *Blackley v. McCabe*, 16 Ont. App. 295.

<sup>10</sup> *Stephens v. McNeill*, 26 Barb. (N. Y.) 651.

<sup>11</sup> *Currier v. Davis*, 11 Mass. 480.

<sup>12</sup> *Emery v. Hobson*, 62 Me. 578; but see *Veazie Bank v. Winn*, 40 *id.*, 62. See also *Emery v. Hobson*, 62 Me. 578; *Woodman v. Thurston*, 8 Cush. (Mass.) 157.

<sup>13</sup> *Farmers & Mechanics' Bank v. Third National Bank*, 165 Pa. St. 500, 30 Atl. 1008.

drawer receives a dividend from the drawee's estate insufficient to cover the check does not of itself constitute a waiver of the payee's laches.<sup>14</sup>

§ 426. **The First Presentment for Payment fixes the Drawer's Rights.** — If a check be presented for payment, and the bank is ready and offers to pay, but the payee for his own convenience declines to receive payment immediately, the drawer is thereby discharged, even though the check be subsequently presented, still within the proper period, and be then dishonored by reason of the failure of the bank. In the case cited, when the first presentment for payment was made the bank offered to pay; but the payee, for some reason of his own, seems to have changed his mind and determined not to take the money at once. The second presentment for payment was afterward made within the proper time, *i.e.* during banking hours on the next day following that on which the drawer delivered the check to the payee, and an effort was made in argument to show that the drawer undertook that the check should be honored any time during banking hours on that day, but the court said that his undertaking was only that the check should be paid whenever it should first be presented for payment within that period. Had the first presentment been, not for payment, but for some other specific object, *e.g.* an inquiry as to the genuineness of the signature, the dishonor upon the subsequent presentment (being the first presentment *for payment*) might have held the drawer.<sup>1</sup>

§ 427. **Presentment by Mail.** — It is sufficient presentment and demand to send the check through the post-office to the bank on which it is drawn.<sup>1</sup> Though precisely what is the duty of the bank, receiving the check through this channel, in order to honor or to pay it, does not seem very clear.<sup>1a</sup> The ordinary course of business could only hold a bank to pay cash over the counter, or to pay through the routine of the clearing-house, neither of which methods would seem a practicable response to such a demand as

<sup>14</sup> Rockwell *v.* Dye, 42 App. D. (Hun, N. Y.) 520 (1899).

<sup>1</sup> § 426. Simpson *v.* Pacific Mutual Life Ins. Co., 44 Cal. 139. See also Boyd *v.* Nasmith, 17 Ont. R. 40; Noble *v.* Doughten, 72 Kan. 336, 83 Pac. 1048, 3 L. R. A. (n. s.) 1167 (1905).

<sup>1</sup> § 427. Hare *v.* Henty, 10 C. B. N. s. 65; Bailey *v.* Bodenham, 16 *id.*, 288; Prideaux *v.* Criddle, L. R. 4 Q. B. 455.

<sup>1a</sup> If the bank sends the money by mail its duty is, in the absence of instruction, to register the package and obtain a receipt therefor. Clay City National Bank *v.* Conlee, 106 Ky. 788, 51 S. W. 615 (1899).

the foregoing. (§ 236.) But the weight of authority sustains the custom between banks of presenting checks by mail.<sup>2</sup>

§ 428. **Notice of Dishonor.** — The drawer of a check is not discharged by failure of notice of non-payment unless he is injured thereby.<sup>1</sup>

*Residence Unknown*

If the residence of the party to be notified is unknown, the time is extended during reasonably diligent inquiry, and if this is fruitless, no notice need be given.<sup>2</sup>

*Notice by One whose Liability is Fixed Enures to the Benefit of Others*

If a party has himself received notice, and his liability is fixed, so that on payment he will be entitled to reimbursement, he may notify other parties, and such notice will enure to the benefit of all other parties to whom the one notified is liable on the paper.<sup>1</sup>

*The Payee or his Agent cannot Enlarge the Time by Taking a Check instead of Demanding Cash upon the Proper Day*

A. gave B. a draft upon the 5th, drawn on the C. Bank; B. sent it by post to C. on the 5th, telling him to remit. The draft reached C. on the 7th, and on the same day C. sent a check for the amount. It reached B. on the 9th, and on the 10th B. tried to collect, but the check was refused. On the next business day, the 12th, he gave A. notice of dishonor. *Held*, that B. was guilty of laches, discharging A.<sup>1</sup>

For, by the usual method, viz., sending draft by express, or to some one (not the drawee) to collect (even if not sent till last mail of the 6th), it ought to have reached C.'s town on the 7th, and have been presented on the 7th (as indeed it was, if the demand by letter was good), and, if not paid, notice should have been sent to B. by mail of the 8th, and to A. by mail of the 10th at latest. The payee (or his agent) cannot enlarge the time by taking a check instead of money, and waiting till next day to see if it is good. If he takes a check, he must collect it the same day; he cannot

<sup>2</sup> *Bank v. Lattimer*, 64 Mo. App. 321.

<sup>1</sup> § 428. *Exchange Bank v. Sutton Bank*, 78 Md. 577, 20 Atl. 563.

<sup>2</sup> *Farwell v. Curtis*, 7 Biss. 160. See *Bailey v. Bodenham*, 12 W. R. 865.



have until the next day to present the check, for it was his duty to secure payment on *that* day, not the next day, and a check is not payment.

So here, waiving all other questions, B. received the check on the 9th, and waited until the 10th to present it, and until the 12th to give notice, thus enlarging the time for notice of dishonor two days; for, by law, notice should have been sent by him to A. on the 10th at least, as the return mail had not brought him the money, but a check.

The bank receiving a check by mail should give notice of dishonor.<sup>3</sup>

Notice of dishonor may be given by telephone.<sup>4</sup>

<sup>3</sup> *Bank v. Lattimer*, 64 Mo. App. 321.

<sup>4</sup> *American National Bank v. National Fertilizer Co.*, 125 Tenn. 328, 143 S. W. 597 (1911).

## CHAPTER XXXII

### PAYMENT OF CHECKS

#### § 430. ANALYSIS.

##### A DUTY OF BANK.

When there is presented in banking hours <sup>441</sup> a properly signed <sup>432-440</sup> check, that is not stale <sup>441-443</sup> or otherwise open to suspicion,<sup>444</sup> and the bank has available funds sufficient <sup>445</sup> to meet the check, and the case fulfils the other conditions named in § 310, it is the duty of the bank to pay the check in "good money"; and if it refuses, it will be liable to a suit by the drawer, and in some States the holder also may sue; but if, for any reason, the case is not a clear one, the bank may properly take time to inquire, stating that its refusal is qualified, not absolute, and reserving funds from subsequent demands until the case is inquired into.

##### (1) SIGNATURE.

§ 432. The bank should require the signature to be identical with the credit on its books.

Agent's check.

§ 433. Giving money to an agent to deposit confers no right upon the agent to draw it as agent.

Check of authorized agent may be properly paid, though it is an overdraft, going beyond the limit given by the drawer to the bank.

Revocation of agent's authority.

Married woman's checks.

§ 434. A bank may always treat a woman as though she were a *feme sole* until notified to the contrary, and in some jurisdictions afterward.

§ 435. Joint deposit.

Check requires signature of all.

§ 435. Joint and several.

The order of any one is good.

§ 436. Co-trustees.

All must sign, but in some cases equity will give one authority.

§ 437. Assignees.

Same rule as co-trustees.

§ 438. Co-executors and co-administrators.

Signature of any one is sufficient.

Pennsylvania *contra*.

§ 439. Firm checks.

The bank must pay checks in partnership name, drawn by one partner, and not post-dated.

## PAYMENT OF CHECKS

But must not pay him funds on a check signed in the name of one partner only.

- (a) Nor is it in fault for refusing the check of one not known to it as a partner.
- (b) If funds standing to individual credit are paid on a firm check, the bank will absolve itself if it can show that the funds were really partnership property.
- (c) Form of signature.
- (d) Surviving partner may draw the firm funds on a firm check, or on his individual check as survivor.
- (e) Dissolution of the firm.

### § 440. Corporation checks.

An agreement or mode of dealing may determine the manner in which checks should be drawn, and

The bank is held to a knowledge of what it can learn from the corporate articles and organic law as a whole, but it is not bound to inquire if persons signing as directors have been duly appointed. Internal irregularities in the corporation cannot affect the bank; it may presume that acts are rightly done when they purport to be done in the manner required by the organic law.

- (a) Treasurer usually can check.
- (b) If the bank pays on the signature furnished to it as the proper one by the proper authorities, and it has no knowledge, actual or constructive, that the signature furnished is not the correct one, it will be protected in paying on checks signed according to the furnished form.
- (c) The check should purport to be a corporation check.

### § 440 A. Successors in office command the deposit that was under the official control of their predecessors.

#### (2) SUSPICIOUS CIRCUMSTANCES.

##### (a) Staleness.

§§ 441-443. When a check becomes so old as to put a taker or a bank paying it upon inquiry, and make them subject to equities between prior parties, as, for example, when the check has been paid by the drawer, but left outstanding, or has been lost, etc., is a difficult question, upon which very conflicting answers are given. Usage has not yet crystallized.

### § 444. (b) Uncertainty.

Disagreement, omission, or erasure on the check may call for inquiry.

The bank is justified in paying according to the clear intent of the drawer.

The written sum controls figures.

### § 445. Time for inquiry should be taken by the bank in any case that is not clear.

### § 446. (3) INSUFFICIENT FUNDS.

The bank is under no obligation to make a partial payment on a check, unless the holder is willing to deliver the check to the bank as its voucher.

But whether it is bound to pay if the holder is willing to give up the check is a question.

Justice would be best subserved by holding that the bank should pay in such case, for the holder has a right to the

## PAYMENT OF CHECKS

deposit, so far as it will go to satisfy the check, just as the depositor himself would have if he stood at the counter with a check drawn in his own name.

It has been held that, if the holder offers to deposit enough to make up the deficiency of funds, the bank must pay, and indorse the amount on the check.

### (4) LEGAL TENDER.

§ 447. Payment must be made in legal tender, unless the right is waived. Foreign coin is not sufficient, if objected to.

§ 448. It must be made in good money, for a payment in counterfeit coin or forged notes is no payment, and it is not necessary to take the objection at the time of the payment.

§ 449. But other payments made and received in good faith cannot be

### B. RECALLED.

§ 449. Otherwise, if the bank suspects the bills it pays are depreciated or worthless, or if the holder knows the drawer has no funds.

But payments made through the

### CLEARING-HOUSE

Can be recovered, if the insufficiency of funds is discovered so as to return the check within the hour set.

### C. ORDER OF PAYMENT.

The rule is, First come, first served.

§ 450. (a) If a check is refused for insufficiency of funds, and afterward a smaller check is presented, for which the funds are sufficient, the bank can be in no fault in paying this. The only place where fault can be is in refusing the first check. If that was right, paying the second is right. If that was wrong, paying the second is not the wrong, for that was already done at the refusal. § 446.

(b) If several checks are presented at once, making a total too large for the funds, the first in date should be paid first. New York *contra*, holding that the bank is under no obligation to pay any.

§ 451. D. PAYMENT BY GIVING CREDIT OR CERTIFYING.

§ 452. E. PAYMENT AFTER THE BANK IS INSOLVENT.

If this is not known to payee or depositor, and is made in the regular course of business, is good.

§ 453. F. THE DUTY OF THE BANK IS CONFINED TO PAYMENT AT ONCE.

### G. PAYMENT BY MISTAKE.

§ 454. Money paid by mistake of fact may be recovered (but not if the mistake is of law), except

If the bank is negligent, and correction would cause loss to a party not equally negligent, the bank cannot recover.

§ 455. A mere mistake as to funds will not base a claim for recovery from the holder. The bank must look to the drawer, except under the clearing-house rules, and even then only the excess of payment beyond the funds on hand can be recovered.

§ 454. If the mistake is fraudulently concealed, the Statute of Limitations does not run. (Mass.)

§ 454. There is no presumption of mistake.

§ 456. The bank must follow precisely the direction of the drawer. Payment before date of check is at the bank's risk.

§ 457. So also in case of payment to the wrong person, though this is questionable where the bank uses due diligence, according to all the means of identification given by the drawer.

(a) Payment of order by telegraph.

(d) Payable to certain person or "bearer."

§ 440 B. If the bank can show that the funds really went to their proper destination, though improperly paid, the bank is discharged.

§ 440 B. So, if the payment has been ratified by the person entitled to § 477. object to it.

H. THE DRAWER MAY SUE THE BANK FOR DISHONORING HIS CHECK.

§ 458. Measure of damages.

I. DEFENSES.

§ 459. Insufficient funds, or not enough available, as if funds, though in bank, have so recently been deposited, as not to have been communicated to the proper clerk in the ordinary routine. Lien.

Revocation, etc., or any link that is lacking in the statement of § 310 or § 430, to complete the duty of the bank, will be a defence.

§ 460. J. POSSESSION OF PAID CHECKS by the bank is as agent of the drawer, unless they are overdrafts; then the bank may retain them adversely until its claim is settled.

§ 460 A. K. PAYMENT OF CHECKS ON OTHER BANKS.

§ 431. **Presentment must be in Banking Hours.** — A banker is not bound to pay a check presented after banking hours. But if a check is presented after banking hours, and an officer of the bank undertakes to make any answer to the payee concerning it, it has been said, though it probably would not be reiterated in the United States, that he ought to tell him that it may be paid on presentment the next morning, provided of course the condition of the drawer's account at the time of making the statement warrants it.<sup>1</sup> This remark is contained in the English cases only, and it is the custom in London that a check presented after banking hours shall be marked, if the depositor has funds, and shall have precedence of others at the clearing-house next day.

§ 432. **Upon whose Checks the Bank shall Pay.** — The indebtedness of the bank upon a deposit is discharged *pro tanto* by its payments made upon any order, check, or draft signed by any person who would have the power to demand and receive the deposit, regarded as a simple debt, and to give full and sufficient acquittance for it.<sup>o</sup>

<sup>1</sup> § 431. *Whittaker v. Bank of England*, 6 Carr. & P. 700; 1 Crompt., M. & R. 744.

<sup>o</sup> § 432. But in order to charge the account of a depositor a bank must pay only to the payee named in the check, or to his order when drawn pay-

**Signature.** — The theory of the law furnishes no sound reason for excepting checks from the general rule that where one executes an instrument simply "A. B., Trustee", or "A. B., Executor", or the like, the appended words, if not explained by the context, must be construed simply as words of description. In order to make it clear in what character or capacity A. B. is acting, he should *state under what trust he is trustee* or of *whose estate he is executor*. Accordingly, it has been held that where a check was signed "R. K. B., Agent", it was the check of R. K. B., and that he was personally liable in case of its dishonor.<sup>1</sup> But where the words "Ætna Mills" were printed on the margin of a check, which was signed "I. D. F., Treasurer", the court said that the fact of the agency was sufficiently apparent on the face of the instrument, that the check was that of the company, and that I. D. F. could not be held personally liable upon it.<sup>2</sup> These decisions, however, bear upon the liability of the drawer of the check, and not upon the duty or obligation of the bank, which is probably restricted to requiring a signature which shall correspond with the terms of the deposit account. If A. B. deposits money to the account of "A. A., Trustee", or of "A. B., Executor", the bank is not bound to inquire or to take notice of any fact as being intimated by these additional words. He deposits as "A. B., Trustee"; he may draw out as "A. B., Trustee." He might deposit in a fictitious name, or under a firm or corporate style, as convenience or a whim should induce him. The bank is absolved if the signature is that of the person making the deposit, and if it accords precisely with the name, description, or style to the credit of which that person chose to place the money. Hence, if the depositor instituted the account in his name as "Trustee for C. D.", it is possible, and would follow from a rigid application of the strict rule of the law, that a check paid from that account upon his signature simply as "Trustee" might not be regarded as a good payment, if the money did not really come to the use of the trust estate. The proper and only safe rule for the bank able to order. *Grand Lodge v. State Bank*, 92 Kan. 876, 142 Pac. 974 (1914).

If the bank has no notice of fraud in procuring checks to be drawn it is not negligent in honoring them, and it is not liable to the drawer for paying them as it would be for paying forged checks. *Southern Hardware & Supply Co. v. Lester*, 166 Ala. 86, 52 So. 328 (1910).

<sup>1</sup> *Bickford v. First National Bank of Chicago*, 42 Ill. 238.

<sup>2</sup> *Carpenter v. Farnsworth*, 106 Mass. 561, citing a number of cases decided in the same State concerning the general point of the disclosure of agency in the execution of an instrument.

to adopt is to require the signature to be identical in terms with the credit on the books.<sup>3</sup>

§ 433. **Agent's Checks.** — A bank may of course pay checks drawn by a duly authorized agent,<sup>o</sup> but merely giving money to an agent (A.) to deposit does not confer any authority upon the agent to withdraw the money <sup>oa</sup> (§ 314); and if the bank has notice that the funds are not the property of A., it will be liable to the principal for paying without his order.<sup>ob</sup>

But if checks are drawn by an agent duly authorized,<sup>oc</sup> the bank may pay them and charge the principal,<sup>od</sup> although the latter has notified the bank not to allow an overdraft beyond a certain limit which the said check transcends.

A bank must not pay on an agent's check drawn after notice from the principal revoking agent's authority,<sup>1</sup> and the fact that the old account has been closed and a new one opened is no defence;<sup>1a</sup> but if a check has been already drawn, the burden of proof is on

<sup>3</sup> See *Tryon v. Oxley*, 3 G. Greene (Iowa) 289; *Bank of Belmont v. Bank of Banesville*, 58 Ohio St. 207, 50 N. E. 723.

<sup>o</sup> § 433. One may by one's own negligence be estopped to deny the authority of the apparent agent. *Scanlon-Simpson Lumber Co. v. Germania Bank*, 90 Minn. 478.

<sup>oa</sup> If one has deposited money in the name of another and the bank or the one making the deposit has notified him of the credit given, one has no right thereafter to withdraw the money. *Heath v. New Bedford etc. Co.*, 184 Mass. 481, 69 N. E. 215 (1904); *Dixon v. Jackson Exchange Bank*, 149 Mo. App. 585, 129 S. W. 481 (1910).

But when the owner of a check indorses it in blank and gives it to another for deposit the bank, in the absence of notice, is justified in making payment thereof to the holder. *Peerrot v. Mount Morris Bank*, 120 App. Div. 247 (1907), 104 N. Y. S. 1045.

<sup>ob</sup> *Honig v. Pacific Bank*, 73 Cal. 464, 15 Pac. 458; *Dixon v. Jackson Exchange Bank*, 149 Mo. App. 585, 129 S. W. 481 (1910).

<sup>oc</sup> Kiting checks will not be presumed to be within the authority of the agent. *Farmers' etc. Bank v. Germania Life Ins. Co.*, 150 N. C. 770, 64 S. E. 902 (1909).

<sup>od</sup> But the bank cannot charge against the account of the depositor money paid upon a forged check, or upon a check to which the bank has obtained title by way of a forgery. *United States v. National Bank of Commerce*, 205 Fed. 533 (1913).

<sup>1</sup> *Farmers', etc. Bank v. King*, 57 Pa. St. 202.

A bank must not pay an agent's check from money especially reserved to the principal's own control. *Hiller v. Bank of Columbia*, 92 S. C. 445, 75 S. E. 789 (1912).

<sup>1a</sup> *Stoll v. Commercial National Bank*, 44 Utah 262, 140 Pac. 115 (1914).

A bank which is a national depository is chargeable with notice of the limitations of the authority of the agent to draw out the money. *United States v. National Bank of Commerce*, 205 Fed. 433 (1913).

the principal to show that the holder to whom the bank paid the check was not a holder for value.<sup>2</sup>

Where an agent drew a post-dated check, signing it as agent, but without indicating his principal, the latter was held not liable to a transferee before date.<sup>3</sup>

§ 434. **Married Woman's Checks.** — In the absence of circumstances charging it with knowledge that a woman is married, a bank may open an account with her and pay her checks as if she were a *feme sole*; and if it turns out that she was really married, and the money was her husband's, the latter, who put the confidence in her and enabled her to commit the fraud, must bear the loss.<sup>1</sup> And it has been further held, that, even though a bank may know the woman is married, it may lawfully receive deposits from her and pay her check.<sup>2</sup>

The whole matter of the rights of a married woman depends so much upon the statutes of the various States, that reference must be had to them and to the decisions under them in the particular jurisdiction in which the question may arise.<sup>3</sup>

§ 435. **Joint and Joint and Several Deposits.** — If several persons, not being partners, make a deposit to their joint credit, the bank ought, strictly speaking, to have the signatures of all of them appended to a check before paying it.<sup>1</sup> But if the deposit be made to their joint and several credit, then the order of any one of them may be honored. Mr. Grant *loco citato* intimates that, in case of a payment made from a joint account solely, upon the order of less than all the depositors, the amount paid could not be recovered by the bank from the actual signers, on the ground

<sup>2</sup> Penn Bank *v.* Frankish, 91 Pa. St. 339.

<sup>3</sup> Anderton *v.* Shoup, 17 Ohio St. 125.

<sup>1</sup> § 434. Dacy *v.* New York Chemical Manuf. Co., 2 Hall (N. Y.) 550.

<sup>2</sup> German Bank *v.* Himstedt, 42 Ark. 64; 46 *id.*, 537.

<sup>3</sup> Wilderman *v.* Rogers, 66 Md. 127, 6 Atl. 588.

<sup>1</sup> § 435. See Grant on Bankers and Banking; Innes *v.* Stephenson, 1 M. & Rob. 145; Stone *v.* Marsh, Ry. & M. 364; Brandon *v.* Scott, 7 El. & Bl. 234, 237; 26 L. J. Q. B. 163; Wallace *v.* Kelsall, 7 M. & W. 242; Husband *v.* Davis, 10 C. B. 645; Dixon's Case, 2 Lewin Cr. Cas. 178; Sloman *v.* Bank of England, 14 Sim. 459; 9 Jur. 243; Columbia Finance etc. Co. *v.* First National Bank, 116 Ky. 364, 76 S. W. 156 (1903); Gish Banking Co. *v.* Leachman, 163 Ky. 720, 174 S. W. 492, 1915 D. L. R. A. 920.

And if the bank purchases a draft or receives for collection a check payable jointly and indorsed by only one who also forges the name of the other, it is liable to the true owner as for a conversion if it pays the proceeds to the one who presents it. Kaufman *v.* State Savings Bank, 151 Mich. 65, 114 N. W. 863, 123 Am. St. Rep. 259, 18 L. R. A. (N. S.) 630, n. (1907).



that the proceeding on the part of the bank would, under the circumstances, be simply a gratuitous payment.

Where three persons drew a check directing the bank to pay "selves or bearer", and each one of them signed the check in his own single and individual name, and the check was put aside and kept as collateral security, it was held that it was the joint, and not the joint and several debt of the signers, so that an action would not lie against one of them for the whole amount of the note.<sup>2</sup>

Where funds which are deposited to the joint account of a husband and wife, but which are the sole property of the husband, are paid out on checks signed by the wife alone, the husband may recover the entire amount of such payments from the bank, except those of which he has received a benefit.<sup>3</sup>

§ 436. **Trustees.** — If the deposit is placed to the credit of divers persons, as *trustees*, the signature of all is indispensable to the validity of the check.<sup>0</sup>

But in one case in England, where the trust fund was small, and there were five trustees, who were scattered widely asunder throughout the kingdom, the Court of Chancery interfered, to save expense, and made an order that payment should be made to them "or any of them."<sup>1</sup> Grant, in citing the case,<sup>2</sup> seems half inclined to question the propriety of the decision; and declares that, at any rate, it would seem that the fund must have been previously under the control of the court, as happened to be the fact in the particular case.

§ 437. **Assignees.** — In England, the inclination has been to extend the same principle, by analogy, to assignees of an estate in bankruptcy. Grant considers it as still doubtful whether the signature of one assignee would suffice to discharge the bank.<sup>1</sup> In *Can v. Read*,<sup>2</sup> the Lord Chancellor said that he doubted whether the receipt of one assignee given in return for a payment made to him singly would discharge the debtor; that the discharge could not be absolute unless a receipt were also obtained from the

<sup>2</sup> *Other v. Iveson*, 24 L. J. Ch. 654; 3 Drew 177.

<sup>3</sup> *Gish Banking Co. v. Leachman*, 163 Ky. 720, 174 S. W. 492, 1915 D. L. R. A. 920.

<sup>0</sup> § 436. See *Columbia Finance etc. Co. v. First National Bank*, 116 Ky. 364, 76 S. W. 156 (1903); *National City Bank v. Third National Bank*, 177 Fed. 136 (1910).

<sup>1</sup> *Shortbridge's Case*, 12 Ves. Jr. 28.

<sup>2</sup> Grant on Bankers and Banking.

<sup>1</sup> § 437. Grant on Bankers and Banking.

<sup>2</sup> 3 Atk. 695.

co-assignee. The ruling was based on the principle that assignees in bankruptcy are a sort of trustees. Equity, however, will also exert the same control over the funds in the hands of the assignees when one of them absconds, which we have seen that it would exert, on other sufficient cause, over an ordinary trust fund. So, where one of three co-assignees absconded, the two remaining assignees petitioned the Court of Chancery that the bank should be ordered to pay upon checks signed only by them, and the Lord Chancellor made the order as requested.<sup>3</sup> So long as our Bankruptcy Act remained in force, the question was not one which could ever arise in this country. For the act expressly directed how the deposits and drafts of the assignees should be made and signed, and no check could be properly paid by the bank unless it had not only been signed according to the law by both assignees, but had also been countersigned by the register in bankruptcy.<sup>4</sup>

§ 438. **Co-executors.** — As the ordinary rule in regard to executors and administrators is precisely the converse of that concerning trustees, and as the signature of one executor is sufficient to discharge a simple contract debtor, so the signature of one of several who are co-executors or co-administrators *de facto*, to a check, is sufficient authority to the bank to pay it.<sup>1</sup>

But the following case would seem to be of a contrary purport. Two co-executors opened their joint account as such with certain bankers. The bankers afterward failed, and their composition paper and discharge were signed by one of the executors on behalf of the estate. Subsequently, in suit against the bankers, it was held that this was not a valid acquittance. The court said: "It were futile to open a joint account, if one of the depositors could withdraw the money. All must, therefore, unite in the receipt or check, in order to discharge the banker; and it follows that he cannot rely on a compromise or release by one as a defence. This is not so much an exception to the rule, that a payment to a co-executor discharges the debt, as a return to the general rule to which that is an exception."<sup>2</sup>

<sup>3</sup> *Ex parte Hunter*, 2 Rose 363; 1 Meriv. 408; stated to be decided on the authority of *Ex parte Collins*, 2 Cox Ch. 427.

<sup>4</sup> Rule XXVIII., supplementary to the Act to establish a Uniform System of Bankruptcy, approved March 2, 1867.

<sup>1</sup> § 438. *Ex parte Rigby*, 19 Ves. Jr. 463; *Can v. Read*, 3 Atk. 695; *Allen v. Dundas*, 3 T. R. 125; *Pond v. Underwood*, 2 Ld. Raym. 1210; *Prosser v. Wagner*, 1 C. B. n. s. 289; *Gaunt v. Taylor*, 2 Hare 413.

<sup>2</sup> *De Haven v. Williams*, 80 Pa. St. 480.

§ 439. **Firm Checks.** — Ordinarily every firm or partnership has its firm name or style in which the checks drawn by it are signed, either by any one of the partners or by any attorney sufficiently empowered thereto by the partnership. The bank must pay checks not post-dated, and drawn in the partnership name.<sup>1</sup> But a bank must not pay partnership funds on a check signed by a partner in his own name instead of the firm name.<sup>2</sup>

As a bank is bound to know its customers' handwriting, so it is bound to know the handwriting of the various members of the partnership; for the combination of all their handwritings may be said to constitute the handwriting of the firm which is the customer. Each of them is entitled to draw a check, and to sign it with the firm name, and the bank is bound to recognize and honor the instrument; though, of course, the firm could not prevail in a suit brought to recover damages from the bank for its failure to honor a check signed by a partner whose signature had never been furnished to the bank. In like manner, it is bound to honor checks signed with the firm name by an agent or attorney duly empowered so to sign.

*Bank not Obligated to Pay Check of One it did not Know was a Partner*

(a) Grant lays down that the bank is not bound to pay a check signed by one who is not known to it to be a member of the co-partnership; as, for example, by one who is a dormant partner.<sup>3</sup> But in a judicial decision, recognizing the correctness of this rule, it was also added, that if there was any evidence, however slight, going to show that the bank ought to have known the fact of the signer's partnership, then the question was made for the jury, whether or not the bank ought to have known this. If the question were answered in the affirmative, the bank would be held to all

<sup>1</sup> § 439. *Forster v. Mackreth*, L. R. 2 Ex. 163; *Kirk v. Blurton*, 9 Mees. & Wels. 284; *Emly v. Lye*, 15 East 7; *Nicholson v. Ricketts*, 20 L. J. Q. B. 55; *Gish Banking Co. v. Leachman*, 163 Ky. 720, 174 S. W. 492, 1915D L. R. A. 920, n.

<sup>2</sup> *Coote v. Bank*, 3 Cranch (C. C.) 50. See *Willey v. Crocker-Woolworth National Bank*, 72 Pac. 832 (Cal.) (1903); *Interstate National Bank v. Claxton*, 77 S. W. 44, Tex. Civ. App. (1903).

A bank is charged with notice that one of the partners has no right to apply the partnership assets to the payment of his individual debt. *Columbia Finance etc. Co. v. First National Bank*, 116 Ky. 364, 76 S. W. 156 (1903).

<sup>3</sup> Grant on Bankers and Banking.

the consequences of actual knowledge; if in the negative, then the bank would be acquitted for its nonpayment.<sup>4</sup>

*Bank may Show that Individual Deposit was really Firm's*

(b) On the other hand, it is allowable for the bank to show that a deposit or credit standing in the name of an individual partner was really partnership property, and in fact a partnership credit. By proof of this it will be absolved if it has paid partnership checks out of these funds. But its proof must be very thorough and satisfactory. Simple evidence that the money deposited was at the time partnership property does not go far enough; but must be supplemented apparently by evidence that it was also really *paid in* on partnership account, and was designed to constitute, or at least ought rightfully to have been designed to constitute, a fund available for partnership uses, and for the honoring of partnership checks.<sup>5</sup>

But the mere fact of the existence of a trade partnership does not raise an implication of law that a single partner is authorized to bind the firm by opening a bank account on its behalf, but in his own individual name.<sup>6</sup>

Doubtless, also, unless the checks were signed, as is customary, simply with the firm name, the fact might be properly regarded as so extraordinary and suspicious that the bank would be protected if in good faith it should refuse payment on them until it could have time for inquiry. At the same time, it is surprising to see in what a number of cases persons do not seem to have been content simply to sign the firm name, but have discovered the greatest number of ingenious methods of evading a duty apparently so very simple and unobjectionable. Two or three of these cases may possess sufficient interest or value to justify a brief summary of them. They are all English.

*Forms of Signature*

(c) A check signed "A. & Co. per procuration of A." is a good check to bind the firm, and may accordingly be paid by the bank from the funds standing to the credit of the firm.<sup>7</sup>

<sup>4</sup> *Cooke v. Seeley*, 2 Exch. 746.

<sup>5</sup> *Sims v. Bond*, 5 Barn. & Ad. 389.

<sup>6</sup> *Alliance Bank v. Kearsley*, 6 L. R. C. P. 433; 40 L. J. C. P. 249.

<sup>7</sup> *Williamson v. Johnson*, 1 Barn. & Cr. 149.

A check was signed by one partner only; but he distinctly stated himself to be signing also on behalf of all the rest, thus: "For A., B., C., and D. — C." It was held that the obligation bound the partnership, inasmuch as C. had authority to execute such an obligation in the name of the partnership; also that C. could not be individually held upon it.<sup>8</sup>

Whether or not a partner could sufficiently bind the firm by signing the individual names of the several partners respectively, instead of simply signing the firm name, is a question which is perhaps not fully settled. The inclination is to answer it in the affirmative. Grant is only willing to put it as a *quære*. But the case which he cites seems to support the validity of this species of signature.<sup>9</sup>

Where a bank has notice that it should pay no checks of a firm unless they are countersigned by the bookkeeper, the bank cannot recover against the firm after payment of checks not so countersigned, unless it can be shown that the firm received the benefit of the money so paid.<sup>9a</sup>

### *Surviving Partner*

(d) On the death of one partner, the survivor may draw checks against the partnership account, either in the firm name or his own as survivor.<sup>10</sup>

### *Dissolution of Firm*

(e) If the partnership be dissolved, with an understanding or agreement between the partners that one of them, or any other person on their behalf, shall have control of the funds and affairs for the purpose of winding up business, it is essential that the authority conferred upon this individual be clearly exclusive of any residuary or coördinate authority still remaining in any of the other partners. This fact should be distinctly stated to the bank. Otherwise it is possible that the bank might still be justified in continuing to pay upon checks signed by any member of the

<sup>8</sup> *Ex parte* Buckley, 14 M. & W. 469. This case overrules the previous case of *Hall v. Smith*, reported in 1 Barn. & Cr. 407; 2 D. & R. 584, which was to a contrary effect. The opinions were given by Barons Parke, Alderson, and Platt.

<sup>9</sup> Grant on Bankers and Banking; *Norton v. Seymour*, 3 C. B. 792.

<sup>9a</sup> *Gladstone Bank v. Keating*, 94 Mich. 429, 53 N. E. 1110.

<sup>10</sup> *Backhouse v. Carlton*, 8 Ch. D. 444 (1878).

partnership; for a general power to one to settle affairs is not, as a matter of legal necessity, a deprivation as against the rest of all power to act in any matter;<sup>11</sup> neither is it authority to the bank to assume that the other partners have parted with or lost their rights in what has certainly been their own property.

If two distinct firms unite in their capacities as such to form a third firm, payment upon the check of either of the component firms is valid.<sup>12</sup>

If a limited partnership is formed by the partners of an old firm and a third party, and a deposit is made in the name of the limited partnership, a partner of the new firm may draw on its account in payment of an overdraft of the old firm even though the cashier of the bank in which the deposit was made was told that the new firm would not commence business for a day or two, but was not informed that the articles of co-partnership provided that the business of the new firm should not begin until the day after the making of the deposit.<sup>13</sup>

§ 440. **Corporation Checks.** — Where a corporation opens a deposit account with a bank, it is ordinary prudence for the bank to satisfy itself upon the matter of who are the officers competent under the charter or the by-laws to draw checks. If it makes payment upon checks signed by officers among whose legal functions the right of signature does not appear, then it runs a very serious risk of being still held responsible to the corporation for the amount thus irregularly paid away.<sup>0</sup> It may find means to protect itself by showing an implied authority in the officer so to sign; or a subsequent ratification by the company of the particular

<sup>11</sup> *Porter v. Taylor*, 6 Mau. & Sel. 156.

<sup>12</sup> *Duff v. East India Co.*, 15 Ves. Jr. 198; *Collyer on Partnership*, p. 455.

<sup>13</sup> *La Montague v. Bank of New York*, 183 N. Y. 173, 76, N. E. 33 (1904), modifying judgment in 94 App. Div. 219, 88 N. Y. S. 21 (1904).

<sup>0</sup> § 440. *Guaranty State Bank etc. Co. v. Oklahoma Coal Co.*, 209 Fed. 350 (1913).

The bank assures itself of the authority of the corporate officer to draw checks for its own protection in discharging its indebtedness, and not as agent of the corporation. *Havana Central Ry. Co. v. Central Trust Co.*, 204 Fed. 546 (1913).

A bank is not charged with notice that checks drawn to the treasurer's own order are being improperly used, but if it knows that the officer of a corporation is using a check on the funds of the corporation for his own personal benefit, such as payment of his own debts or deposits to his own credit, the bank is put upon inquiry and upon failure to make inquiry, pays at its peril. *Havana Central Ry. Co. v. Central Trust Co.*, 204 Fed. 546 (1913).

act of signing; or by proof that the money was actually spent in the due and necessary course of the corporate affairs. But these are slender reeds on which to rely. Even if these facts exist, it will probably be difficult, and perhaps impossible, for the bank to gather competent evidence of them. The *prima facie* case is against the bank if it pays on a check irregularly or improperly signed; and as formalities are often of vital importance in corporate affairs, a bank cannot neglect to demand strict compliance with them without incurring serious danger of loss.

Through the corporate articles the bank is held to a knowledge of the duties of directors, and the mode of appointment, and the manner in which under said articles money may be drawn, and it should exercise due care to know if the company is a going concern, or has stopped, parted with its assets, etc. But if the bank pays checks signed by these directors of the company, according to the form sent to it by these directors for its guidance, it is not obliged to inquire whether the directors have been *duly appointed* according to the articles of association.

The bank is not affected by irregularities in the internal management of the company; it is *entitled to presume that external acts are rightly done when they purport to be done in the manner in which they should be*.<sup>1</sup>

### *Treasurer Usually can Check*

(a) The power of signing checks may be conferred in a considerable variety of ways. Thus, in many States, general laws governing corporations may prescribe the rule; otherwise, the charter of the particular corporation may prescribe it, perhaps in contravention of such laws. It may be left to be declared in by-laws. And in the absence of regulation by any of these methods, it may be settled by custom, course of dealing, and the implied power arising from these sources. Ordinarily, it is assumed, in the absence of specific regulation, that the treasurer has control of the funds of the company. Yet it is by no means certain that this general assumption would alone afford a safe and sufficient basis to justify the bank in paying money on a treasurer's check.

<sup>1</sup> § 440. *Mahony v. East Holyford Mining Co.*, 33 Law T. 383-386; *Fountaine v. Carmarthen Railroad Co.*, L. R. 5 Eq. 316; *Ernest v. Nicholls*, 6 H. L. Cas. 401; *First National Bank v. G. V. B. Min. Co.*, 89 Fed. 439 (1898). See *First National Bank v. Joseph Fleming etc. Co.*, 226 Pa. St. 416, 75 Atl. 718 (1910).

The technical theory is, that a check is like an acquittance, discharge, or receipt, given for an ordinary money debt. But it by no means follows that this rule can be applied as a universal touchstone, with the view of holding that a payment may be safely made on a check signed by any person who can receipt for payments made to the corporation. For it may well be that the corporation may have created an agent whose function is or includes the right to make collections and give receipts, without any right whatsoever to sign checks. Further, if the power to draw checks is conferred by statute or charter upon any designated officer, it may be that it is not conferred exclusively. The positive affirmance of the law, that one shall be able to draw checks, may not in all cases preclude the corporation from conferring expressly or by implication the same power upon other officers also. This will depend upon the language of the law of the corporate existence. The old English rule of law requiring all documents in the nature of contracts to be executed under the corporate seal, has been so long forgotten and disused in respect to such common instruments of daily use as checks and receipts, and the like, that it has almost sunk out of memory.<sup>2</sup>

*Signature Furnished the Bank*

(b) Upon the whole, no rule can be laid down under which a bank can be sure of protecting itself, except that it shall always inform itself by sufficient inquiry who may sign, and in what form they are to sign. For though ordinarily the general fiscal officer will have control of the bank deposit, yet this is not necessarily or always the case. Especially frequent is the habit of requiring his checks to be countersigned by some other of the corporate agents. How far a bank would be affected by a knowledge of such a regulation, which had not been especially brought to its notice, is still an open question. If the rule were only in the by-laws, it might be regarded as incumbent on the corporation to notify the bank, rather than on the bank to inquire of the corporation.<sup>2a</sup> But if the law of the corporate existence were a public law, the courts would, as we have seen, demand knowledge of it on

<sup>2</sup> *Serrell v. Derbyshire Railroad Co.*, 9 C. B. 811; 19 L. J. C. P. N. S. 371.

<sup>2a</sup> Where the bank was advised of the by-law and also agreed to honor checks only when properly countersigned it is liable for loss occasioned by paying a check without its being countersigned. *Ellis v. Western National Bank*, 136 Ky. 310, 124 S. W. 334 (1910).



the part of the bank officers, as a part of their own duties. If the person whose signature is furnished to the bank at the time of the deposit as that of the party authorized to draw checks thereafter does draw them, the bank will be protected in its payments upon them, even though properly he was not empowered to draw.<sup>3</sup>

But this rule, it seems to us, must be taken with the qualifications, 1st, that the signature be furnished by the proper authority, or such persons as the bank has a right to regard as proper authorities, *i.e.*, either the directors *de jure* or *de facto*, or some person having actual, or as to the bank implied, authority to furnish the signature; and, 2d, that the signature furnished shall not be a wrong one within the actual knowledge of the bank, or within such knowledge as it is bound to have from the articles of association and organic law in general.

In the cited case the moneys of the company were sent by some person to the bank at the opening of the account, and were credited to the company. The president was in the bank when the money came in, and left his signature with the bank as the one on which the money should be drawn. The court said that the directors did not in fact intend to give the president any such power, nor had he such power *ex officio*. The bank officers had no right to presume from Brown's position that he had a right to check out the corporate funds. But there was proved a custom of the New York banks, upon opening an account, whether by corporate or other person, for the one making the deposit, or who was to draw the money, to leave his signature on the signature-book, and that all payments were made on that signature; and as the company was negligent in not sending a deposit ticket or requiring a certificate of deposit in the company's name, the deposit must be considered as made by the president, or under his direction, and the loss must be considered that of the company. The case is very unsatisfactory. The bank credited the amount to the company, and not to the president, and the bank knew that the president had no authority, by virtue of his office, to draw the money, and his authority surely cannot be determined by his own representations.

<sup>3</sup> *Fulton Bank v. New York & Sharon Canal Co.*, 4 Paige (N. Y.) 127.

But if the bank allows money to be drawn on checks not signed in conformity with signature cards left with the bank as a guide, it is liable therefor. *Shoe Lasting Co. v. Western National Bank*, 70 App. Div. 588 (1902), 75 N. Y. S. 627.

Suppose the porter had brought the money, telling the bank it was company money, and left his name as the signature on which the company should be paid. Would the bank have been justified in paying? It seems clearly, No. Yet the cases differ in no essential.

The case cited by the court in this Fulton Bank decision to support the above idea is entirely aside. A husband gave his wife money to deposit for him. She deposited in *her own name*, leaving her signature as the one upon which the money should be drawn, and the bank had no notice that the money was not hers, nor even that she was married.<sup>4</sup> Here the bank knew the money was not that of the president.

In England, the deed of settlement, as they style the corporate charter, often specifically requires all corporate checks to be signed by three directors.

(c) In whatever form the check may be drawn, it would seem at least that it should be clearly signified, by some words upon its face, that it is designed to be and is the check of the corporation.<sup>4a</sup> It is by no means necessary that the signature should be that of the corporate name; but the corporate nature of the act must be clearly apparent. In the case of *Serrel v. Derbyshire Railroad Company*,<sup>5</sup> where the signature of three directors was required, a check was introduced which was signed by three persons, who were as matter of fact directors, but who did not so style themselves on the face of the check. Neither was there upon it any further reference to the corporation than was comprised in the impression of a stamp, which bore the corporate name and a date. It was decided that the check did not sufficiently purport to be the check of the company, and would not bind the company, even in the hands of a *bona fide* holder for value.<sup>6</sup> It is an unavoidable corollary from this, that the bank having the corporate funds on deposit would not have been protected in paying this check, and could not have had credit for the amount in its account with the corporation, had the money been misapplied. But how far in such a case it would avail the bank to show that, in the usual course of its previous dealings with the corporation, checks drawn

<sup>4</sup> *Dacy v. New York Chemical Manufacturing Co.*, 2 Hall (N. Y.) 550.

<sup>4a</sup> See Signature, *supra* § 365.

<sup>5</sup> 9 C. B. 811; 19 L. J. C. P. n. s. 371.

<sup>6</sup> But see *Bickford v. First National Bank of Chicago*, 42 Ill. 238; *Carpenter v. Farnsworth*, 106 Mass. 561.

in this form had always been cashed without question, no authorities enable us to say. Grant puts it as a *quære*, but apparently inclines to think that evidence to this effect might materially benefit the bank, provided the transaction were in no part tainted with any approach to bad faith.<sup>7</sup> But the authorities<sup>8</sup> which he cites must be acknowledged not to be very conclusive or satisfactory.

If a bank can show that the money paid out on checks signed by directors, but not *as* directors or not in proper form, really went to the corporation, it can charge the same to the company.<sup>9</sup>

§ 440 A. **Successors in Office.** — When money is officially deposited by an officer or a board of officers, their successors command the deposit.<sup>1</sup>

§ 440 B. **Substance cures Form.** — If no substantial injustice results, the bank is not liable, though a payment has been made upon an order not in proper form. For example, if in any case a check has been paid by the bank upon an insufficient signature, yet there is authority to support the doctrine that, if the bank can show that the money so paid was actually applied in good faith, and according to the requirements of law, in the due course of the execution of the trust or administration or bankruptcy proceedings, or of the business of the corporation or partnership, from the funds of which it was paid, then the bank, in the absence of any fraud in the transaction, may be held acquitted by the payment. If the *cestuis que trustent* have really received the sums due to them under the trust; if the heirs at law and legatees of one deceased and the creditors of a bankrupt have in fact received all the money to which the amount of the estate entitled them; if the corporators and copartners have really enjoyed the benefit of the money taken from the bank through its application in the necessary course of the conduct of their affairs, — there is no reason why they should be extraneously enriched from money obtained by mulcting the bank in a second disbursement of a sum which it has once paid, though without a due regard to legal formalities. Provided the

<sup>7</sup> Grant on Bankers and Banking.

<sup>8</sup> *Barber v. Gingell*, 3 Esp. 60, which holds that the fact that one has habitually paid forged bills may be shown, as constituting an adoption by him of a similar bill, against which he seeks to set up the forgery. *Levy v. Pyne*, 1 Car. & M. 453; *Bult v. Morrell*, 12 Ad. & El. 745.

<sup>9</sup> *In re Norwich Yarn Co.*, 22 Beav. 143.

<sup>1</sup> § 440 A. *Lewis v. Park Bank*, 42 N. Y. 463; *Carman v. Franklin Bank*, 61 Md. 467; *Tay v. Concord Savings Bank*, 60 N. H. 277; *Indiana Trust Co. v. International Building etc. Ass'n*, 165 Ind. 597, 76 N. E. 304 (1905).

sum was honestly paid by the bank, was honestly applied, and has reached its proper destination, doubtless the bank is absolved. It may not be a very valuable method of defence for the bank, which is not likely often to have the means of tracing the money, and affording satisfactory legal proof of its use after the payment ; but such as the privilege may be, it is one which enures to the bank for whatever it may in any case be worth.<sup>1</sup>

### *Ratification*

So if any payment has been ratified by a person who could have objected, such person can thereafter hold the bank to no liability on that account. As where a deposit was made in a savings bank to the credit of "Olive J., David, Agt.", evidence that at the times of entry of balances the book was in possession sometimes of Olive and sometimes of David, and that part of the money drawn out by David was used in Olive's business, was held to establish a ratification by Olive of the payment to David.<sup>2</sup>

§ 441. **Cases in which Checks have been held Stale.** — A draft was drawn October 15, 1881, indorsed the same day to E., who held it (there is no explanation of the reason) until March 8, 1882, when he indorsed it to J. *Held*, that the lapse of four months and twenty-three days after issuance made the draft overdue.<sup>1</sup>

### *Memorandum Check Two Years Old Stale*

Where a person took a check two and one half years old, and having the abbreviation "mem." written on its face, it was held that these facts were sufficient to put him upon his inquiry, and that in default of inquiry the check in his hands was subject to such equitable defences as the drawer could maintain against the payee.<sup>2</sup>

<sup>1</sup> § 440 B. *In re Norwich Yarn Co.*, 22 Beav. 143. The deed of settlement required a check to be signed by three directors. The court said that, though money had been had by the directors on a check not so signed, yet it should be allowed to them in passing their accounts *if it had been bona fide applied to the purposes of the company*. *Can v. Read*, 3 Atk. 695; *quære*, whether payment to one of several assignees of a bankrupt estate, *unless he brought the sum to account*, would discharge the debtor.

<sup>2</sup> *Wileox v. Onondaga County Savings Bank*, 40 Hun (N. Y.) 297.

<sup>1</sup> § 441. *La Due v. First National Bank of Kasson*, 31 Minn. 33 (1883).

<sup>2</sup> *Skillman v. Titus*, 3 Vroom (N. J.) 96.

*Five Days Stale*

In a case where the payee of a check lost it, and the finder, five days after the date of the check, tendered it to a shop-keeper in payment for goods, and the shopkeeper received it and gave change for it, and then obtained its amount from the banker on whom it was drawn, the payee was allowed to recover the amount from the shopkeeper in an action for money had and received; the court holding that the person who tendered the check had no title, and could transfer none, the check being overdue at the time of the tender.<sup>3</sup>

Since then, however, in a closely similar case, where the check was taken six days after its date, the court held that no such flaw could be imported into the title by reason of the age of the check; for that the rule, which could not be questioned as to bills of exchange and promissory notes, did not obtain concerning checks.<sup>4</sup>

§ 442. **Checks held not Stale.** — It has been held that a person receiving a check several days after it is drawn (ten days in this particular case) receives it without being subject to any equities or defences, as between the drawer and the payee or any previous holder, of which he had no notice at the time when, or before, his title accrued.<sup>1</sup>

To like effect was the decision given in the case of a check which, in the hands of the payee, might have been avoided as in contravention of the Bankrupt Act, but which an innocent indorsee for value, receiving it fourteen months after its date, was allowed to enforce against the drawer.<sup>2</sup>

A holder who takes a check six, or seven, or ten days after date, is not subject to equities between prior parties, of which he had no notice.<sup>3</sup>

<sup>3</sup> Down *v.* Halling, 4 Barn. & Cr. 330.

<sup>4</sup> Rothschild *v.* Corney, 9 Barn. & Cr. 389, 391. See Ames *v.* Meriam, 98 Mass. 294.

<sup>1</sup> § 442. Ames *v.* Meriam, 98 Mass. 294; so Rothschild *v.* Corney, 9 Barn. & Cr. 389, 391, where the time was six days; and see Lancaster Bank *v.* Woodward, 18 Pa. St. 357; Serrell *v.* Derbyshire Railroad Co., 9 C. B. 811; Poorman *v.* Mills, 39 Cal. 345; but see, *contra*, the earlier case of Down *v.* Halling, 4 *id.*, 330.

<sup>2</sup> Cowing *v.* Altman, 71 N. Y. 435; 79 N. Y. 167; see 1 Th. & C. (N. Y.) 494.

<sup>3</sup> Ames *v.* Meriam, 98 Mass. 296; First National Bank *v.* Harris, 108 Mass. 514; Stewart *v.* Smith, 17 Ohio St. 82.

A check drawn in St. Paul and cashed six days later in Denver is neither stale nor overdue.<sup>3a</sup>

A check given on Saturday is not to be considered stale on Monday, for the purpose of affecting the party who takes it on Monday with the infirmities affecting the title of the party from whom he receives it.<sup>4</sup>

Some authorities, however, in discussing when the taker of an old check could be held to take it, like other stale or overdue paper, subject to the same equities to which it is liable in the hands of the transferrer, go so far as to say that the check is never, until outlawed by lapse of time, to be considered as overdue for the purpose of bringing it within the operation of this rule of law. They say that in fact a check is not really due until it is demanded; therefore it is not overdue until it has been presented and dishonored.<sup>5</sup>

Bayley, in his work on Bills, would have the same rule as to equities apply to checks which applies to bills and notes.<sup>6</sup> But Mr. Grant seems to put it better. He says: "There is an obvious distinction between a bill or a note having a fixed day for payment, which is taken when overdue, and a check found in circulation long after its date: in the first case, suspicion of necessity attaches; in the latter, suspicion may or may not justly arise, according to circumstances; whether it does, is for the jury to say; the staleness of the check may be a ground on which they may infer fraud; but there does not seem to be any rule of law which points out any given degree of staleness, as evidence conclusive on that point."<sup>7</sup> The question is (as stated in Kent's Comm., *loc. cit.*), whether the taker of the overdue check "exercised a reasonable caution in taking it", and this is of course a question of fact for the jury.

Chief Justice Savage had previously said: "I apprehend that greater diligence has been required in presenting checks than has ever been required in presenting bills of exchange."<sup>8</sup>

<sup>3a</sup> *Estes v. Lovering Shoe Co.*, 59 Minn. 504, 61 N. W. 674.

<sup>4</sup> *Clark v. Stackhouse*, 2 Mart. (La.) 326, at p. 327.

<sup>5</sup> Story on Promissory Notes, Sharswood's ed., pp. 678, 679; Daniel, Neg. Inst., §§ 1633, 1634; *Cruger v. Armstrong*, 3 Johns. Cas. (N. Y.) 5; *Barough v. White*, 4 Barn. & Cr. 325; *Rothschild v. Corney*, 9 Barn. & Cr. 389.

<sup>6</sup> Chap. V. § 3.

<sup>7</sup> On Bankers and Banking, 3d ed., p. 71. To the same purport, see 3 Kent's Comm. 91, n. b; *Mohawk Bank v. Broderick*, 13 Wend. (N. Y.) 133.

<sup>8</sup> *Mohawk Bank v. Broderick*, 10 Wend. (N. Y.) 304. To the same purport is also *Gough v. Staats*, 13 *id.*, 549.

§ 443. **Age of Check as affecting Bank's Duty.** — The duty of the bank to honor a check is not affected by its age, at least within the period of the Statute of Limitations. The check is a continuing order, good at any time before outlawry or revocation; and the bank, having sufficient funds of the drawer, is under the obligation to pay it, and is protected in paying it, at any time within these limitations.<sup>1</sup> The only effect of age is to put the bank upon its inquiry. Age may be a cause of suspicion, but not of avoidance. It is the right, and perhaps the duty, of the bank to inquire into the matter before paying an old check. Grant declares this to be a sound and ordinary rule of business. Yet at what time a check becomes "old" is an indefinite question, not capable of being accurately answered. Certainly it is not so old as to put the bank upon inquiry simply because it has not been presented within the period heretofore declared to be proper as between drawer and payee. The rules governing presentment, as between drawer and payee, do not have any close application as between drawer and drawee, or as between payee and drawee. If, however, the bank chooses to waive its privilege of inquiry and pay the check, it may do so. If the check be good, the bank will suffer no loss. But if the check ought not to have been paid, and the bank, by inquiring, would have discovered the fact, then the bank may be held to bear the loss arising from its own laches. The question of whether or not there was culpable laches will be for the jury. So would also be the question whether or not the bank had insisted upon inquiry without sufficient cause, arising in an action by the depositor against the bank for damages for not honoring his check.<sup>2</sup>

*Lapse of a Year after Day Named for Payment Puts Bank on Inquiry*

We will take leave of this topic with the statement of the Pennsylvania case of the Lancaster Bank *v.* Woodward.<sup>3</sup> It is the most valuable of all which bear upon the matter under discussion. A check was drawn, in which a day certain was named for payment.

<sup>1</sup> § 443. *Dehers v. Harriot*, 1 Show. 164; *Brown v. Davies*, 3 T. R. 80; *Sturtevant v. Forde*, 4 Scott, N. R. 668; *Rothschild v. Corney*, 9 Barn. & Cr. 388; *Willetts v. Phoenix Bank*, 2 Duer (N. Y.) 121.

<sup>2</sup> *Boehm v. Sterling*, 7 T. R. 423; cited to the same point in *Bayley on Bills*, Chap. V. § 3; and both cited in *Grant on Bankers and Banking*, p. 71; *Lancaster Bank v. Woodward*, 18 Pa. St. 357.

<sup>3</sup> 18 Pa. St. 357.

Neither on that day nor on any subsequent day had the drawer funds in the bank to meet the check. After the lapse of one year from the day named for payment, the check was presented to the bank and demand made. The bank paid it. The drawer, having in the meantime discharged the original debt, and considering, therefore, that the check was no longer good, at least as against him, refused to reimburse the bank, which accordingly brought suit against him. The court said that the authorities differed as to whether the question of what was reasonable time for the presentment of a check should be regarded as a question of law for the court or of fact for the jury. Generally speaking, the latter was probably the better course. But in this case payment of so old a check, under such circumstances of suspicion as the drawer's continued want of any deposit to meet it, must be considered to show a degree of negligence on the part of the bank so great that the court felt itself justified in taking the case from the jury, on the ground that, as matter of law, the bank could not recover. The circumstances were "sufficient to put the bank on inquiry"; its negligence in failing to make inquiry precluded it from relief as against the drawer.<sup>4</sup>

§ 444. **Errors in Writing Checks.** *Bank is justified in paying according to the intent of the drawer.*—An error or omission occurring in the writing of a check, which is simply clerical, and so obvious that there can be no question in the mind of a reasonable person as to what was the actual intent of the drawer, may be safely disregarded by the bank. A payment made upon such a check according to its clearly intended tenor will be protected. Of course in determining what particular defect will be covered by this rule, the officers of the bank can have no guide beyond their own discretion. But the doctrine is designed for their protection, not for the imposition of an extraordinary duty upon them in judging of and correcting their customer's mistakes. If there can be any shade of doubt in their own minds, they are perfectly at liberty to decline to put an interpretation upon the document other than that which its naked phraseology distinctly expresses. It is only where they voluntarily consent to adopt its obvious intent in place of its strict expression, that they will be saved harmless

<sup>4</sup> In a case in New York, arising between individuals, parties to the check, it was held that, where the facts were not disputed, the question of whether or not due diligence had been used in presentment was one of law for the court. *Bryden v. Bryden*, 11 Johns. (N. Y.) 187.



in doing so if the case shall be judged to be a sufficiently clear and certain one to have authorized their action. A fair example of the species of correction which it would be safe for a bank to make is furnished by the check which the court had to construe in the case of *Phipps v. Tanner*.<sup>1</sup> There the words, "twenty-five, seventeen shillings & three pence", were written, and alone designated the sum for which the order was drawn. The omission of the word "pounds" after "twenty-five" was declared to be so clearly accidental, that it might be supplied.

### *Written Sum Controls Figures*

Where the sum written in the body of the check differs from the sum expressed in figures in the corner or margin, the written words, as being the more deliberate act of the drawer, are presumably correct and will control the figures.<sup>2</sup> This rule received a strong illustration in the cited case of *Smith v. Smith*. The marginal figures differed from the sum written in the body, and were altered by the holder so as to make them conform to the written words, but without the knowledge or consent of the drawer. It was sought to have this transaction declared a forgery, as being an alteration of the instrument in a material part. But the court said that the marginal figures in a bill of exchange served only as an index for convenience of reference, and formed no part of the bill. The bill was not vitiated by an alteration in them which only caused them to conform to the written sum. Nay, where they differ from the body, it is even laid down that evidence is inadmissible to show that the bill was in fact negotiated for their amount, and not for the amount expressed in the written words. No case could well go farther, or be more conclusive of the whole matter, than this.

§ 445. **Qualified Refusal. — Time for Inquiry.** — The position of the bank with regard to the payment of checks must often be a very delicate one. For it is, as it were, placed between two fires. If it refuses to pay a check which it ought to pay, then it is liable in damages to the depositor. If it pays a check which it ought not to pay, in ninety-nine cases out of a hundred the loss will be its own. It is noteworthy, however, that in no case where

<sup>1</sup> § 444. 5 Carr. & P. 488. See also the cases discussed and cited in the chapter on "Checks in General", where the mark \$, or the word "dollars", had been accidentally omitted in writing the check.

<sup>2</sup> *Saunderson v. Piper*, 5 Bing. New C. 430; *Smith v. Smith*, 1 R. I. 398.

damages have been awarded to a depositor, or where the rule has been laid down that he should have damages, has it been otherwise held or expressed than that the damages should be given for an absolute, unqualified refusal to pay.<sup>0</sup> Now, it may well be that a refusal to pay, where for any sufficient cause the bank has reason to doubt the regularity of any part of the transaction, only until the bank can assure itself of the real facts, would be considered so far different from an absolute refusal that it would be sanctioned as justifiable and proper. Of course the bank *should reserve funds enough, during the time of its inquiry, to meet the check*, if it should prove to be correct. *Of course also it should make the qualified nature of its refusal, and its intent so to withhold funds enough to secure the check, distinctly known* to the holder at the time of his demand. Then there might be left, as a fair question for a jury, whether or not the conduct of the bank was *bona fide*, and the circumstances of suspicion sufficient to justify the delay for inquiry. The finding of these facts in the affirmative ought to absolve the bank from any liability to either holder or drawer, even though neither of these parties wilfully or negligently gave occasion for the suspicious circumstances. For the nature of the banking business is such, that unless the privilege of taking reasonable precautions of this description for the prevention and detection of fraud and irregularity were allowed, prudent men would shrink from the excessive risk, and the business would fall into the hands of adventurers. Upon a strict legal basis, a demand for a brief delay of payment, for inquiry's sake, need not be construed as an absolute refusal to pay, for which alone the authorities as yet give a right of action.<sup>1</sup>

### *Check Torn and Pasted Together*

It is impossible to conceive of all the various possible occurrences which might suffice to arouse a reasonable suspicion on the

<sup>0</sup> § 445. See *Lorick v. Palmetto Bank etc., Co.*, 74 S. C. 185, 54 S. E. 206 (1906), where damages were awarded for failure to pay a check even though the bank erroneously thought that the money was in the savings department of the bank and told the holder of the check that the drawer had money in the savings department of the bank and that the check would be paid upon presentation of the pass book.

<sup>1</sup> The holder must be careful to show that the bank had funds at the time of presentment; it is not enough to prove that the drawer made sufficient deposits on that day. *International Bank v. Jones*, 15 Brad. (Ill.) 594; *Richardson v. International Bank*, 11 Brad. (Ill.) 582.

part of the bank that the check ought not to be paid. But if such circumstances do exist, and are sufficiently strong to give to the payment by the bank the character of gross negligence upon its part, then the loss resulting from payment is exclusively that of the bank. Where a check had been torn to pieces and pasted together again, and was in this shape presented to the bank and paid by it without inquiry, the laches of the bank was declared to be so excessive that it should bear the loss.<sup>2</sup> Yet, to go back to the argument of the last paragraph, it is evident that, if this tearing to pieces had not been done *animo revocandi*, but accidentally, and in the hands of a *bona fide* holder who had rightfully pasted again, and the bank had refused payment until after inquiry could be had, this dilemma would have arisen: either, on the one hand, that the bank would not be liable in damages to the depositor, though it declined to pay on demand his *bona fide* check, rendered suspicious only after it had left his hands and without his knowledge; or, on the other hand, a *reductio ad absurdum* in this shape, that if the bank pays the check and it turns out that it was irregular, the bank shall bear the loss, but if the bank refuses temporarily to pay, for purposes of inquiry, and the check turns out regular, then the bank shall be liable in damages. The latter horn leaves the bank no safety, save in the power of divination. The extravagance of this real case ought to make it unquestionable that for sufficient cause the bank may demand time for inquiry without subjecting itself to a suit by the depositor, even though he be as innocent of the cause of suspicion as the bank itself. So far, indeed, as the reason of giving the depositor damages for a refusal is based upon the notion that his credit must suffer from it, the basis of the rule in such cases as the above is in great part destroyed. For it can injure no depositor's credit that the bank refuses to pay upon what it fears may be a fraudulent order, or a dishonest effort to secure his funds, if at the time it specifies this as the reason.

§ 446. **Insufficient Funds.** — (a) If an overdraft is presented for payment and refused, this creates no lien on the drawer's actual balance in favor of the holder of the overdraft. The deposit in the bank remains utterly unaffected by this; and the duties and relations of the bank to the drawer and to all other persons are in no respect changed.<sup>1</sup>

<sup>2</sup> Scholey v. Ramsbottom, 2 Camp. 485; Ingham v. Primrose, 7 C. B. N. S. 82.

<sup>1</sup> § 446. Dana v. Third National Bank, 13 Allen (Mass.) 445.

If the bank has not funds enough to the credit of the drawer to pay his check in full, it is not obliged to make payment in part.<sup>2</sup> Whether or not it would be justified in doing so, may be questioned. There is no authority on the point.<sup>2a</sup> Nor would banks often try to exercise such a right. If they can do so, they are obviously bound to indorse the amount of the payment on the check, which would of course still remain in the payee's hands, and which would otherwise on its face appear still to be good for the full value named in it, to the possible deception and loss of the drawer, or of innocent third parties. But the better rule perhaps would be, to save misunderstandings and complications, that, if a bank cannot pay in full, it not only may not, but must not, pay at all. The drawer has not requested it to make a part payment. He has demanded that it do a certain act; to wit, pay a certain sum of money on his account. If it will not do this act according to the terms of the authority embodied in the request, it by no means follows that it is authorized to substitute for it a partial performance, or in fact a materially different act. Power to pay only a part of a sum is not necessarily implied in an order, expressed without alternative, to pay that specific sum.

A device whereby the check-holder may seek to obtain payment, where his check calls for a larger amount than the drawer's balance at the time of presentment, is that the holder may himself pay in, or cause to be paid in, the amount of the deficiency, and have the same placed to the drawer's credit. The drawer's account being thus made good, the check might perhaps be safely honored by the bank. But the bank is not justified in informing the holder what is the amount of the deficiency, or what the state of the drawer's account. He must find it out elsewhere if he can, since the bank can give such information only at its own peril.<sup>3</sup>

The above statement from the second edition of this work may perhaps admit of qualification. See § 294.

(b) In Illinois, the bank is held under no obligation to make

<sup>2</sup> *Murray v. Judah*, 6 Cow. (N. Y.) 490.

<sup>2a</sup> See *Weiland's Adm'r v. State National Bank*, 112 Ky. 310, 65 S. W. 617, 56 L. R. A. (N. S.) 178 (1901), where the bank exercised its privilege of not making payment in part, but afterwards undertook to revoke its action and pay part of the check. The court said: "We think it clear that the bank had no such authority."

<sup>3</sup> *Foster v. Bank of London*, 3 F. & F. 214.

a partial payment; for if it did, the check could not be taken and held as a voucher.<sup>4</sup>

And if the holder is unwilling to leave the check with the bank, this would be unanswerable; but if the holder offers to deliver the check, and especially if he offers to deposit enough to the credit of the drawer to make up the amount of the check, it is the bank's duty to pay the check and indorse the amount upon it. So it has been held in Pennsylvania.<sup>5</sup>

As between holder and drawer, the money clearly belongs to the holder; but as between these parties and the bank, it may be urged that the bank does not agree to go to the additional trouble of keeping such broken accounts, that its agreement is to pay if there are funds, and it will not bother with the matter at all if there are not enough to make the transaction clean. Still, the trouble of indorsing the amount paid upon the check, and giving the holder a memorandum of the transaction, would be slight; and a spirit of accommodation in the interests of justice between other parties ought to induce the bank to pay, even if it may not be urged that, as servants of the public and enjoying privileges granted by it, they owe a duty in return to forward the public good and convenience in such matters. See § 294.

§ 447. **In what Money Checks may be paid.** — *Foreign coin insufficient.* — The legal obligation of the bank is to pay the customer's checks in such paper or coin, and in such quantities of paper or coin of any specific denomination, as the law of the land makes legal tender in the case of any ordinary debt. Hence a tender, though of gold coin, if it be the coin of another country, is not sufficient. The question of value does not enter into the matter at all; *it is a question solely of legal tender.*<sup>1</sup> No other species of tender than that authorized by the laws of the land can relieve the bank from liability to the drawer.

### *Waiver*

But this obligation of the bank, at strict law, may of course be waived and dispensed with by the express or implied consent of the holder of the check. He is perfectly at liberty to accept any

<sup>4</sup> *Coates v. Preston*, 105 Ill. 470.

<sup>5</sup> *Bromley v. Commercial National Bank*, 9 Phila. 522.

<sup>1</sup> § 447. *Grant on Bankers and Banking*; *Wade's Case*, Rep. Pt. 5, 114 a; *Co. Litt.* 207 b; *Lawrence v. Schmidt*, 35 Ill. 440; and cases cited *infra*, which by implication support the same doctrine.

representatives of value which the bank may offer to him. If he does so accept, that is to say, if, at the time when such representatives are offered to him, he does not object to receive them on the ground that they are not what at law he has a right to demand, then this acceptance operates as a complete waiver of the holder's right to refuse anything save legal tender, and the banker is discharged by this payment, both as towards the drawer and the holder of the check. Even if the holder assents to take the promissory note of the banker, it will discharge the check absolutely, and without regard to the fact of whether or not it is paid at maturity.<sup>2</sup> Payments are usually offered either in whole or in part in the bank bills or notes, either of the bank on which the check is drawn, or of other banks, which circulate as currency in the community. The holder may refuse these, when offered to him, if he wishes; but if he takes them, in the absence of fraud on the part of the bank he assumes as his own the risk of their value. The waiver was perfected by the very act of acceptance, and cannot be afterward undone.<sup>3</sup> *E converso*, if it should happen that the funds are at a premium, the profit also is that of the receiver. In short, the money or representatives of value, on the moment when they have been paid over the counter and have been fairly received and accepted without objection by the payee, become the property of the payee, for good or for ill.

*Special Agreement as to what Currency shall be Paid*

Valid agreements may at any time be entered into between the bank and the customer concerning the species of money or currency in which his checks may or shall be honored. The holders of the checks need be no parties to this agreement. They have accepted from their debtor his check as a means of procuring money, but the bank is not therefore liable to pay them money. The nature of the duty of the bank to them is determined by the nature of its duty to the depositor. It is bound to offer to them whatever it has undertaken with him that it will offer to holders of his checks. If this be unsatisfactory to the holders, their sole

<sup>2</sup> Sayer v. Wagstaff, 5 Beav. 415.

<sup>3</sup> Polglass v. Oliver, 2 C. & J. 15; Vernon v. Boverly, 2 Show. 296.

When, in place of cash which is refused, a depositor takes a draft on another bank which he immediately transfers and uses the proceeds thereof, he waives his former demand for currency and the bank is not liable for resulting damages. First National Bank v. Wheatley, 92 Neb. 807, 139 N. W. 673 (1913).

recourse and remedy is against him. But an agreement of this kind does not cover checks drawn before it was entered into, though not presented till afterwards, unless they were in terms included. In the absence of an express stipulation concerning them, they remain payable in the same currency in which the bank would be bound to pay had no peculiar contract been entered into. For the arrangement by the drawer can have no bearing on checks previously issued, and on the accrued rights of the holders of them, which without his knowledge might still be unrepresented.<sup>4</sup>

### *What is Legal Tender*

At present, in our country, the treasury notes of the United States have been made by Act of Congress a legal tender, and payment, or offer of payment, in them satisfies the duty of the bank; though if it has bound itself by a specific agreement to pay in gold or silver coin, it must do so. Even a State bank, organized under State laws, which in terms require all its payments to be made only "in gold and silver", has been held exonerated from this obligation by the supreme authority of Congress, and declared able to discharge all its indebtedness by tender of the treasury notes.<sup>5</sup>

§ 448. **Payment in Forged Paper or Counterfeit Coin.** — A payment in forged paper, or in counterfeit coin, does not discharge the bank. For, as has been already seen in the case of deposits paid into the bank in such material, they do not constitute a payment at all, but are simply a nullity.<sup>1</sup> In discussing payments made in counterfeit coin, Mr. Grant remarks upon the case with which the charge of such a payment might be brought against the bank, and the great and almost insurmountable obstacles in the way of meeting and refuting it; and he says that the rule has therefore been laid down that the objection to the coin must be taken by the payee at the time when it is offered and taken, and that afterwards it will be too late. The difficulty which this rule seeks to obviate is certainly serious and substantial; but the rule itself is neither indispensable in order to meet this difficulty, nor is it intrinsically just. Fortunately Mr. Grant furnishes no citation of judicial authority for it. Why it ought never to obtain this support is easily shown. In the first place

<sup>4</sup> *Marine Bank v. Ogden*, 29 Ill. 248.

<sup>5</sup> *Carpenter v. Northfield Bank*, 39 Vt. 46.

<sup>1</sup> § 448. Grant on Bankers and Banking; *Camidge v. Allenby*, 6 Barn. & Cr. 385.

it is unjust, because it requires that every person requesting to have a check cashed, that is, pretty much every member of the community, more or less frequently in his life, shall be an experienced, accurate, and rapid judge of the pureness and legitimacy of coin, or of the genuineness of bank-notes. Receiving a considerable number of coins or notes at the bank counter, he must then and there, telling it over in the midst of the surrounding hurry of business, be able at once and surely to detect a counterfeit piece. Every one knows that this is simply an impossibility. The rule works to him quite as great an injustice as that from which it relieves the bank. It renders it very nearly an absolute impossibility for him ever to obtain reimbursement. Then, further, the difficulty which the bank will encounter in refuting the charge is no reason whatsoever for refusing altogether to allow the injured person to prove his injury. It is a very poor rule of law that says, because the defendant has a hard task to defend himself, therefore it shall be arbitrarily laid down that no action shall ever be brought against him, and that a person who can show by the most perfect, absolute, and unanswerable proof that he has not been paid his debt, shall yet be forbidden to adduce such proof, and shall be strictly barred from the right of restitution, simply because he did not discover the fact in an instant. It is a hard thing to defend against a charge of rape, or of a breach of promise of marriage; but even criminal prosecutions are still in vogue for the former offence, and considerable sums of money are allowed to change hands in suits for the latter. The true rule is obvious. It simply affects the burden of proof. The obligation upon the plaintiff to make out his case by clear, sufficient, incontestable testimony, may be drawn with all the sternness and rigidity which just consideration for the hard position of the defendant may demand. Every reasonable ruling concerning the comparative thoroughness of the proof to be required of each party respectively may be given and enforced by the court. But it is both folly and injustice to say, that if the plaintiff *actually proves* his right to restitution, yet he shall not have it, because *if* he had been in the wrong the defendant *might* have been practically unable to show it. Let the plaintiff be held to make out his case with any degree of thoroughness that perfect justice can demand, but if he does so make it out, then at least let him have his rights, so incontrovertibly and laboriously proved. The absolute fact, really shown, as it sometimes may be, beyond a doubt, must be allowed



to draw after it the only consequence which is known to justice. For though the bank may have offered the false money unintentionally, and so may not be morally in fault, yet at strict law it has not fulfilled its legal obligation, and it must answer for its failure to do so. It cannot be mulcted vindictively; but it must pay for the actual damage.<sup>2</sup>

Much stronger is the case where the bank tenders to the holder of the check the bills or notes of a bank which it knows, or suspects, or which it has reason to know or suspect, to be in failing circumstances; so that the bills or notes are of doubtful value, or likely rapidly to depreciate. In such case the act of the bank is fraudulent, and there is no reason why the depositor should not recover damages to the same extent to which he could recover for any other utterly wilful and causeless refusal to meet his drafts.<sup>2</sup>

§ 449. **Other Payments made and received in Good Faith cannot be recalled.** — From the moment that the act of transfer is completed, and the minds of the parties have met and agreed upon the thing transferred as constituting a payment, instantly the right of either to repudiate or annul the transaction ceases. If the bank discovers at once that the drawer's account was overdrawn before the check was paid, it cannot recall the funds from the possession of the holder, not even if he be still at the counter, provided the act of transfer had been perfected by the intent and act of both parties, leaving nothing further to be done.<sup>1</sup> But it is of course essential to the working of this doctrine that both parties should be acting throughout the transaction in perfect good faith. For if the bank tender bills or notes which it knows, or which it suspects, or has reason to suspect, are either depreciated or worthless, or are likely immediately to become so, and keeps this fact a secret from the payee, then the payment is not good.<sup>2</sup> *Quære*, whether, on the other hand, if the payee receives, or if he specially asks for, funds which he has private reasons for knowing to stand at a premium, the fact being unknown to and kept secret from the bank, he will be allowed to retain the amount of the premium. Further, it is a fraud on the part of a holder, or payee of a check, to present it for payment, either at the counter to be cashed or through the clearing-house by depositing it in his own bank, provided he knows

<sup>2</sup> Grant on Bankers and Banking.

<sup>1</sup> § 449. *Chambers v. Miller*, 13 C. B. N. S. 125; 3 F. & F. 202; *Boylston National Bank v. Richardson*, 101 Mass. 287.

<sup>2</sup> *Spurraway v. Rogers*, 12 Mod. 517.

at the time that the drawer has not to his credit, in the bank on which it is drawn, any funds, or not sufficient funds to meet it. The holder has no right to attempt to mislead the drawer's bank into erroneously honoring the check, and then to keep the money if his *ruse* is successful. Under such circumstances the mistake of the bank will be revocable at any time after the completion of the transaction; and it may, if need be, recover the amount of the wrong payment in a suit directly against the payee.<sup>3</sup>

§ 450. **Order of Payment, First come, first served. — Small Check after Large one has been refused. — Several Checks together.** — Strictly speaking, if the bank has, at the time of presentment of a check for payment, funds to the credit of the drawer sufficient to meet it, unpledged by any acceptance or undertaking of the bank on his behalf, and upon which no lien for any indebtedness due from him to the bank has attached, the obligation to pay accrues instantly.<sup>9</sup> The bank has no right to defer the payment with the intention of making or refusing it at a later hour, according as it shall be influenced by subsequent occurrences. The rule with checks is, "First come, first served." If payment is demanded at noon upon a check which the depositor's unincumbered balance at that hour is sufficient to pay in full, the obligation of the bank to pay it in full is at once mature and perfect. It is no matter how many checks may be presented at later hours, or how much the sum of all the checks presented in the course of the day may exceed the amount of the customer's balance. This is no concern of the bank; not even if it has been informed that such checks have been drawn, and will be presented for payment. Its perfectly simple duty is to pay in full each check presented, at the time of presentment, so long as the unincumbered credit of the depositor suffices to enable it to make such payments in full. When this credit will no longer suffice for that purpose, then the bank must refuse payment altogether. But it has no right to make itself an agent either of the customer or of the holders of his checks, or of both, with the view of securing an equal distribution, *pro rata*, of the deposit of the former among such of the latter as shall make their demands during banking hours in the same day. Any such proceeding is totally beyond the range of its powers and func-

<sup>3</sup> *Martin v. Morgan*, Gow 123; cited to same point in *Byles on Bills*, p. 16; *Daniel*, Neg. Inst., § 1630 a.

<sup>9</sup> § 450. *Averell v. Second National Bank*, 6 Mack (D. C.) 358; *Bank v. Averell*, 2 App. Cas. (D. C.) 470; *Jacobson v. Bank*, 66 Ill. App. 470, citing *National Lock Co. v. People*, 50 Ill. App. 336.

tions, and is a clear and unwarrantable usurpation of authority. Its rights to secure its own claims, of whatever nature, are shown in the chapter on "Lien and Set-off" to be ample. It is only so long as the customer's balance of all credits against all debits remains good that the checks should be paid.<sup>1</sup>

### *Small Check after Large One Refused*

(a) The only position of difficulty which can be anticipated as likely to occur for the bank is presented by the supposition that a check for an amount exceeding the drawer's balance should be presented and refused for want of funds, and that afterwards a check small enough to be discharged in full from the balance should be presented. The duty of the bank in such a case has never been judicially determined, yet upon the general principles little doubt can be entertained that the bank should cash this latter check. The fact of presentment for payment of an overdraft appears to have no legitimate effect whatsoever upon the balance of the customer. It creates no lien upon it of any description; no sound reason suggests itself why it should be regarded as affecting it at all. The bank is in no possible shape the agent of the holder of such an over-check to aid in securing him payment in full; whence it seems to follow that the simple refusal, without more, of the larger check, furnishes no ground for a subsequent refusal of the later and smaller one.

The case of *Munn v. Burch* (*supra*) does not affect the principles just enunciated. That case was simply to the effect that, if a check was presented for payment, there being at that time funds enough of the drawer in the bank to meet it, payments by the bank on other checks subsequently presented to an amount so far depleting the depositor's balance that it would no longer suffice to meet the first check, would be improper and wrongful. If no sufficient excuse existed for the non-payment of the first check, this conduct of the bank is obviously irregular, and unjust as towards the holder of the first check. The language held by the court would rather tend to sustain the view, that, if the inexcusable and wrongful act of the bank puts the holder of the first check to any vexation, delay, or loss, then the bank will be answerable to him in a suit for damages to recompense his injury. For clearly, as the court say, since the bank has done a wrong act, it must be

<sup>1</sup> *Munn v. Burch*, 25 Ill. 35.

responsible to the person upon whom the effects of the wrong fall. This person can hardly be the depositor, for his credit has been applied to his drafts, and though not in the order of presentment, yet this cannot be assumed to be a matter of any moment to him, since this order is quite beyond his control. But the holder of the refused check, if he has been obliged to lose time, or to be at the cost of legal proceedings to recover the sum which he ought to have received instantly for the mere asking, still more if he ultimately fail to recover that sum in full, is very substantially injured, and directly by the wrongful and illegal action of the bank.

How far the doctrine above laid down would be a subject to modification by usage may be considered somewhat doubtful. *Prima facie* it seems a fair and almost a conclusive argument to say that a usage inconsistent with a rule of law so clear, so entwined with the whole code of laws governing checks, must be regarded as a usage bad at law, and invalid. The only authority which we have upon the point is English, and it covers only a part of the whole ground. It seems that in that country the usage of trade has been allowed by the courts to establish a rule: that a check drawn upon a banker in the city of London "may be retained by the banker on whom it is drawn until five o'clock p.m. of the day on which it is presented, and if there be no assets, it may then be returned to the person presenting it, and that too although it has been, in the first instance, cancelled by mistake, as intended to be honored." But it will be observed that this rule, though it countenances the retention of checks instead of immediate payment, out of deference to a usage merely, does not extend, or at least is not stated to extend, to the length of allowing the banker to return those checks, which at the time of presentment might have been paid, because by the summing up of all the checks presented during the day they appear all together to have amounted to an overdrawing. Mr. Grant, in laying down the very passage above quoted, authorizes by implication the position assumed above, and says: "A check of the ordinary kind is strictly payable, or at least intended to be paid, immediately on demand; and this appears to be universally the case, with the exception of checks drawn on bankers in the city of London", etc.<sup>2</sup>

<sup>2</sup> Grant on Bankers and Banking, citing, to the custom of London, *Fernandey v. Glynn*, 1 Camp. 426, n., and *Leftley v. Mills*, 4 T. R. 175 (per Buller, J.).

*Priority. Several Checks Together*

(b) When a number of checks are presented in gross amounting together to a sum beyond the deposit, the bank may properly pay the *first in date*, so far as the funds will go. Such is the reason of the case,<sup>3</sup> though it seems to be thought in New York that the bank would not be obliged to pay any of them.<sup>4</sup>

§ 451. **Payment of Check by Credit given.** — A credit given for the amount of a check by the bank upon which it is drawn is equivalent to, and will be treated as, a payment of the check.<sup>5</sup> It is the same as if the money had been paid over the counter on the check, and then immediately paid back again to the account or for the use for which the credit is given.<sup>1</sup> This rule has been applied where the bank held the check for several days, during which the drawer's account was not good, and then, the account becoming good, made the application.<sup>2</sup>

<sup>3</sup> 2 Parsons, N. & B. 78.

<sup>4</sup> Dykers v. Leather Manufacturers' Bank, 11 Paige (N. Y.) 611.

<sup>5</sup> § 451. As a general rule this is true when a drawee bank gives credit to a forwarding collecting bank. Pinkney v. Kanawha Valley Bank, 68 W. Va. 254, 69 S. E. 1012, 1912B Ann. Cas. 115, n.; Smith Roofing etc. Co. v. Mitchell, 121 Ga. 772, 45 S. E. 47 (1903); Smith v. National Bank, 191 Fed. 226 (1911). But quære as to whether it is true when by special agreement the drawee bank has no right to give credit. See Pinkney v. Kanawha Valley Bank, *supra*.

<sup>1</sup> Oddie v. National City Bank, 45 N. Y. 735; Bartley v. State, 53 Neb. 311, 73 N. W. 744; American Ex. National Bank v. Gregg, 138 Ill. 596, 28 N. E. 839, citing Oddie v. National City Bank, 45 N. Y. 735; National Bank v. Burkhardt, 100 U. S. 686, 25 L. ed. 766; Washbon v. Linscott State Bank, 87 Kan. 668, 125 Pac. 17 (1912); Patterson v. First National Bank, 73 Neb. 384, 102 N. W. 765 (1905); Bierce v. State National Bank, 33 Okla. 776, 127 Pac. 856 (1912); Haskins v. Dougherty, 22 Tex. Civ. App. 313, 69 S. W. 103 (1902); Hubbard v. Pettey, 37 Tex. Civ. App. 453, 85 S. W. 509 (1904) (and if the bank is insolvent the loss falls upon the depositor); Peters Shoe Co. v. Murray, 31 Tex. Civ. App. 259, 71 S. W. 977 (1903); Second National Bank v. Gibboney, 43 Ind. App. 492, 87 N. E. 1064 (1908); Young v. Bank of Princeton, 97 Mo. App. 576, 71 S. W. 713 (1903); Montgomery County v. Cochran, 126 Fed. 456 (1903); American National Bank v. Miller, 185 Fed. 338 (1911) (the transaction is closed and cannot be reopened in the absence of fraud or mistake); Elliott v. Peet, 192 Fed. 699 (1912); American National Bank v. Miller, 229 U. S. 517, 57 L. ed. 1310, 33 Sup. Ct. 883 (1913); Consolidated National Bank v. First National Bank, 129 App. Div. 538 (1908), 114 N. Y. S. 308, affirmed in 199 N. Y. 516, 92 N. E. 1081.

<sup>2</sup> Pratt v. Foote, 9 N. Y. 463. See Baldwin's Bank v. Smith, 215 N. Y. 76, 109 N. W. 138 (1915).

So also the certification of the check is, as between the bank and the *drawer*, payment of the check.<sup>3</sup>

But where the bank gives drafts to the amount of a check drawn against a deposit and the draft is dishonored the check is not paid.<sup>4</sup>

When a check is drawn, not in the ordinary course of business by one who is not a customer of the bank, upon a conditional deposit, and the intention of the drawer, fully known to the drawee is to have the account transferred, and an officer of the bank, ignorant of the condition of the deposit, received the check and issued a pass-book in which credit was given for the amount of the check the bank is not estopped from declaring itself not bound by the credit indicated on the pass-book.<sup>5</sup>

When a bank receiving a draft of a correspondent drawn on it in favor of another correspondent with instructions to credit the same to the account of the latter, and it notifies the latter that the draft has been received and placed to its credit, but credit is not actually given because of a lack of funds to meet the draft, the notice is merely an erroneous statement and is not the equivalent of an actual credit.<sup>6</sup>

§ 452. **Payment of Check after Insolvency of Bank.** — If a bank be insolvent, and its officers must be reasonably supposed to be cognizant of the fact, but nevertheless it continues for a time to conduct business, and during such period, at any time prior to actually stopping, pays in due and ordinary course of business the check of a depositor, neither the depositor nor the party receiving the money having any reason to know of the insolvency, the amount so paid cannot be recovered back as a fraudulent preference. "The act being done in the ordinary and usual course of business by the company, uninfluenced by the state of

<sup>3</sup> First National Bank of Jersey City *v.* Leach, 52 N. Y. 350; Bullard *v.* Randall, 1 Gray (Mass.) 605. But see *contra*, Bickford *v.* First National Bank of Chicago, 42 Ill. 238; Rounds *v.* Smith, *id.*, 245; Brown *v.* Leekie, 43 *id.*, 497; these cases are stated and discussed *supra*, under title "Acceptance and Certification."

<sup>4</sup> Dingley *v.* McDonald, 124 Cal. 90, 56 Pac. 790.

And where the depositor takes a time check of the president of the bank which he has induced her to believe to be a certificate of deposit the check is not paid. Patterson *v.* First National Bank, 73 Neb. 384, 102 N. W. 765 (1905).

<sup>5</sup> Republic Life Ins. Co. *v.* Hudson Trust Co., 198 N. Y. 590, 92 N. E. 1100 (1909), affirming 130 App. Div. 618, 115 N. Y. S. 503.

<sup>6</sup> Walnut Hill Bank *v.* National Reserve Bank, 141 App. Div. 475 (1910), 126 N. Y. S. 430.

its pecuniary affairs, it cannot be said to be done in contemplation of any particular condition of such affairs.”<sup>1</sup>

§ 453. **Duty of the Bank confined to simple Payment.** — The only act which the bank is under obligation to perform for the holder of the check is to pay it. It is not required to answer the abstract question whether or not the drawer has funds. It is not obliged to accept or to certify. It is not bound to promise or to reserve funds of the drawer to pay it at any future hour or day. Its sole and entire duty is, at the time when actual and immediate payment is demanded, to make such actual and immediate payment. It may voluntarily bind itself by any other undertaking; but in doing so, it goes beyond what can be legally required of it. For its refusal to do anything, save to pay at once and in full, renders it liable to no action by any person whomsoever.<sup>1</sup> (See, however, § 294.) It is noted as one of the distinguishing differences between a check and a bill of exchange, that the former is presentable, as of right, only for payment, and not for acceptance.<sup>2</sup>

§ 454. **Payment by Mistake.** — When a bank honors a draft by mistake of fact, the money may be recovered.<sup>1</sup> If there is

<sup>1</sup> § 452. *Dutcher v. Importers & Traders' National Bank*, 59 N. Y. 5, overruling same case in 1 N. Y. 400; and discussing *Robinson v. Bank of Attica*, 21 N. Y. 406; *McDonald v. Chemical National Bank*, 174 U. S. 610, 43 L. ed. 1106, 19 Sup. Ct. 787.

<sup>1</sup> § 453. *Bradford v. Fox*, 39 Barb. (N. Y.) 203.

<sup>2</sup> *Morse v. Massachusetts National Bank*, 1 Holmes (C. C.) 209.

<sup>1</sup> § 454. *Troy City Bank v. Grant*, 77 N. Y. 365; *Continental National Bank v. Tradesmen's National Bank*, 36 App. Div. (Hun, N. Y.) 112; *Iowa State Bank v. Cereal Refund etc. Co.*, 132 Iowa 248, 109 N. W. 719 (1906) (check inadvertently cashed).

When a bank pays the amount of the deposit of its customer to one of the same name who has wrongfully come into possession of the depositor's bank book the bank may recover from such payee or from a corporation to which he has paid part of the money, with its officers having full knowledge of the mistake. *Merchants' Bank v. Superior Candy etc. Co.*, 41 Wash. 653, 84 Pac. 604 (1906).

When a bank promises M. to pay a check drawn in payment of cattle, and the check when drawn included other purposes, the bank which has paid the check in ignorance of the fact that it was not all in payment for cattle may recover from M. the amount paid that was not for cattle. *First State Bank v. McGaughey*, 38 Tex. Civ. App. 495, 86 S. W. 55 (1905); *First State Bank v. McGaughey*, 48 Tex. Civ. App. 635, 108 S. W. 475 (1908).

If both parties are equally innocent, a recovery can only be had where in equity and good conscience the bank should be called upon to refund. *Crocker-Woolworth National Bank v. Nevada Bank*, 139 Cal. 564, 73 Pac. 456, 96 Am. St. Rep. 169, 63 L. R. A. 245 (1903).

The payment of a forged check by the bank on which it is drawn is an

no mistake of fact, but the bank, knowing the state of the maker's account to be below the amount of the note, pays it voluntarily, relying on the maker's credit, the indorsers are discharged; and the bank cannot retreat from the position it has assumed, though the maker should become insolvent,<sup>1a</sup> and notice be given which would have been sufficient if the bank had not discharged the indorsers by its previous action.<sup>2</sup>

There is no presumption of mistake, and it must be shown that the act of the bank was of this nature.<sup>2</sup>

Money paid with full information as to the facts, but in mistake of law, cannot be recovered.<sup>3</sup> But money paid under mistake of fact, the error not being negligent,<sup>4</sup> or if negligent not causing loss to the payee,<sup>5</sup> or if both negligent and causing loss, yet the payee was negligent equally with or to a greater degree than the payor,<sup>6</sup> can be recovered.

But if negligent in the payor, and the payee, being innocent of negligence, has altered his position on the faith of the payor's action, or lost remedies over, or in any way would be in a worse

exception to the general rule. *Farmers' National Bank v. Farmers & Traders' Bank*, 159 Ky. 141, 166 S. W. 986, 1915A L. R. A. 77, n. But see *Second National Bank v. Guarantee Trust etc. Co.*, 206 Pa. St. 616, 56 Atl. 72 (1903); *Guaranty State Bank v. Lively*, 149 S. W. 211 (Tex. Civ. App.) (1912); *National Bank of Commerce v. First National Bank*, 152 Pac. 596 (Okla.) (1915); *First National Bank v. City National Bank*, 182 Mass. 130, 65 N. E. 24, 94 Am. St. Rep. 637, n. (1902).

<sup>1a</sup> If the depositor is insolvent when his check is paid the bank cannot recover the amount of the check from the payee on the ground that payment was made under a mistake of fact, even though the claim of the bank against the depositor is greater than the amount of his deposit. *National Exchange Bank v. Ginn & Co.*, 114 Md. 181, 78 Atl. 1026, 1914C Ann. Cas. 508, n., 33 L. R. A. (n. s.) 963, n.

<sup>2</sup> *Farmers' Bank v. Vail*, 21 N. Y. 485; *Burkhalter v. Second National Bank*, 42 N. Y. 538.

<sup>3</sup> *Mutual Savings Institution v. Enslin*, 46 Mo. 200.

<sup>4</sup> *Citizens' Bank v. Grafflin*, 31 Md. 507, where a bank paid a draft upon notice of protest for non-payment on September 4, in ignorance that the draft had been protested for non-acceptance on July 22, no notice having been given it. *Kansas Lumber Co. v. Central Bank*, 34 Kan. 635.

<sup>5</sup> *Union National Bank v. Sixth National Bank*, 43 N. Y. 452; *De Nayer v. State National Bank*, 8 Neb. 104; *Crocker-Woolworth National Bank v. Nevada Bank*, 139 Cal. 564, 73 Pac. 456, 96 Am. St. Rep. 169, 63 L. R. A. 245 (1903); *National Bank v. Miner*, 167 Cal. 532, 140 Pac. 27 (1914); *James River National Bank v. Weber*, 19 N. D. 702, 124 N. W. 952 (1910).

<sup>6</sup> *Redington v. Woods*, 45 Cal. 406. See *Imperial Bank of Canada v. Bank of Hamilton*, (1903) A. C. 49, where a check of five dollars was raised to five hundred dollars after being certified and paid by mistake.



condition by correction of the mistake than if the payor had refused payment, the money cannot be recovered from the payee.<sup>7</sup>

A bank, by mistake, overpaid to A.'s clerk, on a check drawn by A., a certain sum. The clerk, upon his return to A.'s place of business on the same day, discovered the mistake, notified A. of it, and requested A. to allow him to return the money to the bank, and A. refused. Upon the clerk's next visit to the bank, within a few days, the bank teller asked him if he had been overpaid, and he denied it. The clerk reported this to A., who approved it, and afterwards kept the money without ever giving notice to the bank. The bank brought an action against A. to recover the money, more than six years after its overpayment. *Held*, that there was a fraudulent concealment by the defendant of the plaintiff's cause of action *within the Public Statutes*, c. 197, § 14; and that the action could be maintained.<sup>8</sup>

Payment on a certain check was ordered stopped. It was presented and payment refused. Several weeks later it was presented again, and was paid through inadvertence. *Held*, the bank could recover from the payee.<sup>9</sup>

When a bank has negligently certified a raised check and has paid the same to another bank which has made payment of the check to its depositor relying upon the acceptance and payment of the check by the first bank it cannot recover its amount.<sup>10</sup>

§ 455. **Mistake as to Funds.** — If a bank pays or accepts under the misconception that it has funds, it cannot recover from the holder,<sup>0</sup> it must look to the drawer alone for redress.<sup>1</sup> But under

<sup>7</sup> *Stephenson v. Mount*, 19 La. Ann. 295.

<sup>8</sup> *Manufacturers' Bank v. Perry*, 114 Mass. 313, 11 N. E. 81.

<sup>9</sup> *Northampton National Bank v. Smith*, 169 Mass. 281, 46 N. E. 1009.

<sup>10</sup> *Continental National Bank v. Tradesmen's National Bank*, 173 N. Y. 272, 65 N. E. 1108 (1903). See *N. Y. Produce Exchange Bank v. Twelfth Ward Bank*, 135 App. Div. 52 (1909), 119 N. Y. S. 988, where there was a recovery of the proceeds of a raised check paid through the clearing house. *McClendon v. Bank of Advance*, 188 Mo. App. 417, 174 S. W. 203 (1915), payment of a raised check was recovered.

<sup>0</sup> § 455. *Robinson v. Bank of Pikeville*, 146 Ky. 538, 142 S. W. 1065, 37 L. R. A. (N. S.) 1186, n. (1912); *First National Bank v. Sidebottom*, 147 Ky. 690, 145 S. W. 404 (1912).

<sup>1</sup> *Hull v. Bank, Dudley* (S. C.) 259; *First National Bank v. Devenish*, 15 Colo. 229, 25 Pac. 177; *Citizens' Bank v. Schwarzschild*, 109 Va. 539, 64 S. E. 954, 23 L. R. A. (N. S.) 1092, n. (1909) (negotiable coupons); *James River National Bank v. Weber*, 19 N. D. 702, 124 N. W. 952 (1910) (payment made to drawer of a check who wrongfully said that he had money on deposit, may be recovered, and the fact that the teller might

the clearing-house rules a check paid through the clearing may be returned within a certain time, if the funds are found insufficient.

*Payment by Mistake of Funds. The Bank can Recover only the Difference between the Funds it had and the Amount Paid on the Check*

(a) In the case of the *Merchants' National Bank v. National Bank of the Commonwealth*, an interesting rule as to the measure of damages was laid down. The drawer of the check had in his bank some funds which might have been applied towards payment of his check at the time of its presentation through the clearing-house, but not enough funds properly so applicable to pay it in full. The court held that his bank having paid in full, and then returned the check as bad in season to recover from the presenting bank, could recover only the amount of the difference between the sum called for by and paid upon the check, and the sum in its hands which might have been applied upon it. The facts that a check which cannot be paid in full from the drawer's funds is usually returned to the drawer, and that the bank, in ordinary course of business, would doubtless not have made a part payment on the check, to the extent of the drawer's real funds in its hands, were declared to be immaterial.<sup>2</sup> The plaintiff was entitled to pay the check so far as it had funds, if it saw fit, and the holder of the check was willing to accept a part; and having made a payment on the check, the bank is not only entitled to hold these funds in its possession for its own reimbursement so far as they will go, but it ought to do so for its own protection, and if it neglects to do so, its claim against the party to whom the mistaken payment has been made will be less by this amount than the total amount paid to him on the face of the check.<sup>2</sup> So far as the depositor had a right to draw, the defendant has now a right to hold.

have looked at the books and discovered error is immaterial). And it is immaterial that a check was paid after banking hours as an accommodation and that the drawer's deposit had been drawn the same day. The reason for the rule is that to permit the bank to repudiate the payment would destroy the certainty that must pertain to commercial transactions of this sort if they are to remain useful to the business public. *Spokane etc. Trust Co. v. Huff*, 63 Wash. 225, 115 Pac. 80, 1912D Ann. Cas. 491, n., 33 L. R. A. (n. s.) 1023, n.

<sup>2</sup> *Merchants' National Bank v. National Bank of the Commonwealth*, 139 Mass. 513, 2 N. E. 89.

§ 456. **Wrong Payments.** — C. drew a check post-dated the 22d, gave it to K., instructing him to get it cashed on the day of its date and give the money to C.'s foreman if C. did not return by noon of that day. K. changed the date to the 21st, got the money, and absconded. C. did not return till afternoon on the 22d. *Held*, that the bank could not charge C. with the amount.<sup>1</sup> A bank can only pay in accordance with the directions of the drawer, and no fraudulent alteration can give it power to do otherwise. It can debit the deposit only with payments made at the time when, to the person whom, and for the amount authorized by him,<sup>2</sup> unless his neglect has opened the door to and invited the fraud.

Payment before date of a check will not discharge the bank, unless made to the true owner. So where a payee lost his check, and the bank paid before its date, it was held to repay the amount to the loser of the check.<sup>3</sup>

When a depositor sends a check to a bank by mail and requests cash therefor, it is the duty of the bank to send the money by registered mail and to take a receipt therefor. And when it does not do so it is liable if the money is lost.<sup>4</sup>

§ 457. **Payment to Wrong Person.** — If a bank pays to the wrong person,<sup>5</sup> relying on false representations for which neither the drawer nor true payee were responsible, it pays at its peril;<sup>1</sup> though, of course, it may recover from the person making such false statements.<sup>1a</sup>

A. drew a check payable to B. to pay for a note and mortgage represented by a broker D. to be a genuine incumbrance on B.'s land. The note and mortgage were forged, and D. took a party to the bank identifying him as B., and the bank paid the check. The drawer recovered of the bank, on discovering that the mortgage, note, etc., was a fraud.<sup>2</sup>

(a) If A. is identified by a man of good character as the payee

<sup>1</sup> § 456. *Crawford v. West Side Bank*, 100 N. Y. 50, 2 N. E. 881.

<sup>2</sup> *Wheeler v. Guild*, 20 Pick. (Mass.) 545.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Clay City National Bank v. Conlee*, 106 Ky. 788, 51 S. W. 615 (1899).

<sup>5</sup> § 457. If the payment is to the party whom the drawer expected to receive the money he is not the wrong person even though he perpetrated a fraud upon the drawer and indorsed the check in the name of the person whom he represented himself to be. *Meyer v. Indiana National Bank*, 27 Ind. App. 354, 61 N. E. 596 (1901).

<sup>1</sup> *Dodge v. National Exchange Bank*, 30 Ohio St. 1 (1876); *Pickle v. Muse*, 88 Tenn. 389, 12 S. W. 919.

<sup>1a</sup> *Lahay v. City National Bank*, 15 Colo. 339, 25 Pac. 704.

<sup>2</sup> *Kuhn v. Frank*, Ohio, 10 Am. Law Rec. 622; 6 Ohio Dec. 1142.

named in a telegraph order presented by A. to the bank, the bank is not negligent in paying him the money, though he should prove not to be the person named in said order.<sup>3</sup>

(b) If the drawer of a check on bank C., payable to the order of bank B., delivers it to A. to deposit in B. to the credit of the drawer, and A. deposits it in his own name as trustee of the drawer, and afterward draws the money, the bank is liable to the drawer.<sup>4</sup>

If the drawer of a check on bank A. payable to the order of M. gives it to M.'s agent who indorses it in the name of M. by G. agt., and presents it at the bank, the bank is bound to determine at its peril that G. had authority to make such indorsement and receive the payment on the check.<sup>4a</sup>

*Bank Negligent in not Making Inquiry*

(c) The plaintiffs received a check payable to their own order. They indorsed it, making it payable to the order of the cashier of the bank with which they were accustomed to do business; put it in an envelope with a deposit ticket; gave the envelope to a messenger, and directed him to carry it to the bank, have it credited to the plaintiff on their bank-book, and bring back the bank-book. The messenger on the way to the bank broke open the envelope, abstracted the check, presented it at the bank, and said that the firm wished to have cash for it. The cash was delivered to him, and he defaulted with it. The court held, but with two judges dissenting, that the bank must make good the amount to the plaintiffs; the circumstances of the presentment and demand were so peculiar as to put the bank upon its inquiry. The bank did not know the messenger; the indorsement did not indicate an intention to have the check collected in money; nor was it in the ordinary course of business to use the check of a third person, drawn upon another bank, as a substitute for the check of the plaintiffs drawn upon their own bank, against a deposit, in the usual manner.<sup>5</sup>

(d) The liquidators of E. Bank handed to their confidential clerk, U., a check drawn on the P. Bank payable to the liquidators, by name, "or bearer", and indorsed by them "for deposit to their

<sup>3</sup> Bank v. Western Union Telegraph Co., 52 Cal. 280.

<sup>4</sup> Sims v. United States Trust Co., 103 N. Y. 472, 9 N. E. 605 (1887).

<sup>4a</sup> McFadden v. Follrath, 114 Minn. 85, 130 N. W. 542, 37. L. R. A. (N. S.) 201, n. (1911).

<sup>5</sup> Bristol Knife Co. v. First National Bank of Hartford, 41 Conn. 421.

own credit." The Q. Bank at that time received deposits from the liquidators, assisting them in the redemption of the bills of the E. Bank. U., instead of making the deposit, presented the check to the Q. Bank, and the teller, who had shortly before requested U. to redeem some of the E. Bank's circulation, and not noticing the restrictive indorsement, paid him in E. Bank bills, which he appropriated to his own use. *Held*, that under the circumstances the payment to U. discharged the Q. Bank.<sup>6</sup>

§ 458. **Customer's Right of Action<sup>o</sup> for Refusal to Honor his Check.** — We have already stated that a bank is under obligation to pay the checks, drafts, and orders of a depositor so long as it has in its possession funds of his sufficient to do so, and which are not incumbered by the attaching of any earlier lien in favor of the bank.<sup>oa</sup> The duty of the bank to make such payments, and the reciprocal right of the depositor to have them made, arise from the contract to that effect<sup>ob</sup> which, though probably never definitely expressed, will always be considered to be implied from the usual course of the banking business.<sup>1</sup> This duty and this right are so

<sup>6</sup> A check payable to a certain person or bearer is equivalent to a check payable simply to bearer, and its negotiability cannot be restricted by indorsement, and the bearer has a sufficient title to demand and receive payment thereof. *Exchange Bank v. Quebec Bank*, 6 Montreal L. R. (S. C.) 10.

<sup>o</sup> § 458. For sufficiency of pleading see *McAndrews v. Security State Bank*, 25 S. D. 590, 127 N. W. 536 (1910); *Levy v. Larson*, 167 Fed. 110 (1909); *Hooper v. Herring*, 9 Ala. App. 292, 63 So. 785 (1913); *Hanna v. Drovers' National Bank*, 194 Ill. 252, 62 N. E. 556 (1901); *Kleopfer v. First National Bank*, 65 Kan. 774, 20 Pac. 880 (1902); *Western National Bank v. White*, 131 S. W. 828 (Tex. Civ. App.) (1910).

<sup>oa</sup> An indebtedness of a bank to a contractor as a balance due on a building contract retained by the bank pending the settlement of certain claims for materials furnished does not on becoming exigible by the contractor constitute money or funds in the hands of the bank subject to be checked out, and the non-payment of the contractor's check does not furnish a legal basis for a claim for damages to the drawer's credit. *McKnight v. Bank of Acadia*, 114 La. 289, 38 So. 172 (1905).

It is the duty of the bank to pay in the absence of notice to a depositor that the bank has applied the depositor's funds to his past due obligations to the bank. *Callahan v. Bank of Anderson*, 69 S. C. 374, 48 S. E. 293 (1904).

<sup>ob</sup> The contract may be to honor checks given in payment of a car load of horses, the bank to be secured by a draft and bill of lading on their shipment. *Falls City State Bank v. Wehrli*, 68 Neb. 75, 93 N. W. 994 (1903).

<sup>1</sup> Byles on Bills, Sharswood's ed., p. \*18; *Downes v. Phoenix Bank*, 6 Hill (N. Y.) 297; *Board of Freeholders v. Newark National Bank*, 48 N. J. Eq. 51, 21 Atl. 185; *Peabody v. Citizens' State Bank*, 98 Minn.

far substantial, that, if the bank refuses, without sufficient justification,<sup>1a</sup> to pay that check of the customer, the customer has his action for damages against the bank.<sup>2</sup> It has been said that if in such action the customer does not show that he has suffered a tangible or measurable loss or injury from the refusal, he shall recover only nominal damages.<sup>3</sup> In New York it is held that a 302, 108 N. W. 272 (1906); *First National Bank v. Vogeli*, 78 Kan. 264, 96 Pac. 490 (1908).

<sup>1a</sup> The notification to a customer that the total amount standing to his credit is a disputed claim is a justification. *Jaselli v. Riggs National Bank*, 36 App. Cas. (D. C.) 159, 1912C Ann. Cas. 119, n. But one has a right to have one's check presented for payment without it being tied up with other checks and connected with a demand for "parring" checks. *Peabody v. Citizens' State Bank*, 98 Minn. 302, 108 N. W. 272 (1906).

<sup>2</sup> Grant on Bankers and Banking; *Whitaker v. Bank of England*, 6 Car. & P. 700; 1 C. M. & R. 744; *Marzetti v. Williams*, 1 Barn. & Ad. 415; *Watts v. Christie*, 11 Beav. 546; *Rolin v. Steward*, 14 C. B. 594; *Birchall v. Third National Bank*, 15 Weekly Notes of Cases, 174 (Phila. Com. Pleas, \$600 recovered); *Bank v. Latimer*, 64 Mo. App. 321; *First National Bank v. Shoemaker*, 117 Pa. St. 94, 11 Atl. 304; *Mt. Sterling National Bank v. Green*, 99 Ky. 262, 35 S. W. 911 (1896); *Wiley v. Bunker Hill National Bank*, 183 Mass. 495, 67 N. E. 655 (1903); *Peabody v. Citizens' State Bank*, 98 Minn. 302, 108 N. W. 272 (1906); *American National Bank v. Morey*, 113 Ky. 857, 69 S. W. 759, 101 Am. St. Rep. 379, 58 L. R. A. 956 (1902); *Spearing v. Whitney Central National Bank*, 129 La. 607, 56 So. 584 (1911); *Jaselli v. Riggs National Bank*, 36 App. Cas. (D. C.) 159, 1912C Ann. Cas. 119, n., 31 L. R. A. (n. s.) 763, n.; *Third National Bank v. Ober*, 178 Fed. 678 (1910); *O'Grady v. Stotts City Bank*, 106 Mo. App. 366, 80 S. W. 696 (1904).

The right of action arises on each check separately dishonored even though they are drawn subsequent to notice of dishonor. *Columbia National Bank v. McKnight*, 29 App. Cas. (D. C.) 580 (1907).

A lady who, at the time her check was dishonored, was pursuing special study in a strange city may recover for any time she lost, or any expenses she incurred, or for any loss of business or instruction that she sustained, but she may not recover for a nervous chill, or for humiliation or mortification of feeling, nor may she recover punitive damages, in the absence of malice. *American National Bank v. Morey*, 113 Ky. 857, 69 S. W. 759, 101 Am. St. Rep. 379, 58 L. R. A. 956 (1902).

In an action against a bank for damages for failure to pay a check drawn upon it, and for returning the check with an indorsement, "no account", by reason of which the drawer was arrested and detained on a criminal charge, damages arising from injuries to reputation and mental suffering cannot be recovered, since they are not the proximate result of the act of negligence complained of. *Hartford v. All Night etc. Bank*, 170 Cal. 538, 150 Pac. 356 (1915). See also *Western National Bank v. White*, 131 S. W. 828 (Tex. Civ. App.) (1910).

If on refusal to pay in currency the depositor accepts a draft and makes no subsequent demand for currency but transfers the draft and uses the proceeds for his own benefit, the bank is not liable. *First National Bank v. Wheatley*, 92 Neb. 807, 139 N. W. 673 (1913).

<sup>3</sup> *Watts v. Christie*, 11 Beav. 546; *Marzetti v. Williams*, 1 Barn. &

depositor may sue in contract or tort<sup>30</sup> for wrongful refusal to pay his check, and if he sues in contract, and the failure of the bank is not charged as wilful and no special damage is shown and the check is finally paid, the plaintiff can only recover nominal damages.<sup>3a</sup> But the better authority seems to be, that, even if such actual loss or injury is not shown, yet more than nominal damages shall be given.<sup>3b</sup> It can hardly be possible that a customer's check can be wrongfully refused payment without some impeachment of his credit, which must in fact be an actual injury, though he cannot from the nature of the case furnish independent distinct proof thereof. It is as in cases of libel and slander, which description of suit, indeed, it closely resembles, inasmuch as it is a practical slur upon the plaintiff's credit and repute in the business

Ad. 415. This is true when the banker is not a trader or merchant and the mistake is due to a clerical error. *Third National Bank v. Ober*, 178 Fed. 678 (1909). See *Western National Bank v. White*, 131 S. W. 828 (Tex. Civ. App.) (1910).

<sup>30</sup> *Columbia National Bank v. MacKnight*, 29 App. Cas. (D. C.) 580 (1907).

The cause of action though sometimes spoken of as in the nature of a tort arises out of a breach of the contract implied from the relation of the parties that the bank will honor the check of the depositor. *Wiley v. Bunker Hill National Bank*, 183 Mass. 495, 67 N. E. 655 (1903); and passes under a common law assignment by the depositor for the benefit of his creditors. *Robinson v. Wiley*, 188 Mass. 533, 74 N. E. 923 (1905).

<sup>3a</sup> *Burroughs v. Tradesmen's National Bank*, 87 Hun (N. Y.) 6; *Clark Company v. Mount Morris Bank*, 85 App. Div. 362 (1903), 83 N. Y. S. 447; judgment affirmed in 181 N. Y. 533, 73 N. E. 1133.

<sup>3b</sup> *Schaffner v. Ehrman*, 139 Ill. 109, 28 N. E. 917; *Atlanta National Bank v. Davis*, 96 Ga. 336, 23 S. E. 190; *Bank of Commerce v. Goos*, 39 Neb. 437, 58 N. W. 84; *Svensden v. State Bank*, 64 Minn. 40, 65 N. W. 1086; *O'Grady v. Stotts City Bank*, 106 Mo. App. 366, 80 S. W. 696 (1904); *Wood v. American National Bank*, 100 Va. 306, 40 S. E. 931 (1902); *Lorick v. Palmetto Bank*, 74 S. C. 185, 54 S. E. 206 (1906); *Hilton v. Jesup Banking Co.*, 128 Ga. 30, 57 S. E. 78, 11 L. R. A. (N. S.) 224, n. (1907); *Columbia National Bank v. MacKnight*, 29 App. Cas. (D. C.) 580 (1907); *Peabody v. Citizens State Bank*, 98 Minn. 302, 108 N. W. 272 (1906); *Spearing v. Whitney-Central National Bank*, 129 La. 607, 56 So. 584 (1911); *Levin v. Commercial etc. Bank*, 133 La. 492, 63 So. 601 (1913); *Commercial National Bank v. Latham*, 29 Okla. 88, 116 Pac. 197, 1913A Ann. Cas. 515, n. If the customer is a trader or merchant. *Third National Bank v. Ober*, 178 Fed. 678 (1909); *Wiley v. Bunker Hill National Bank*, 183 Mass. 495, 67 N. E. 655 (1903); but the fact that the customer is not a trader is immaterial. *American National Bank v. Morey*, 113 Ky. 857, 69 S. W. 759, 58 L. R. A. 956 (1902).

The measure of damages may be controlled by statute. *Hartford v. All Night etc. Bank*, 170 Cal. 538, 150 Pac. 356 (1915).

world.<sup>3c</sup> Special damage may be shown, if the plaintiff be able; but, if he be not able, the jury may nevertheless give such temporary damages as they conceive to be a reasonable compensation for that indefinite mischief which such an act must be assumed to have inflicted, according to the ordinary course of human events.<sup>4</sup> Exemplary damages may be given when the failure to pay is malicious or the result of gross indifference;<sup>4a</sup> but they shall not be given unless the bank was guilty of fraud, malice, gross negligence or oppression.<sup>4b</sup>

The precedents from which an idea of the due and proper amount of damages which may be awarded where no special damage has been shown, are rare. In *Rolin v. Steward*, cited above, the check drawn was only for £87 7s. 6d., but the court seemed to regard the very smallness of the check as rather constituting grounds for greater damages than otherwise. For Lord Tenterden remarked, that it was a discredit to any person, and peculiarly to one in trade, to have a "draft for so small a sum refused." The jury had at first found for the plaintiff with only nominal damages; but the case having been given to them again, under the instructions to find substantial damages, coupled with the remark above quoted, they next returned a verdict for £500 damages. This seemed an error in the opposite direction. The court intimated that it was a very large sum, and the case was finally disposed of by arrangement of the parties between themselves that £200 should be paid as damages. In an action against a bank by a drawer of a check for damages sustained because of non-payment of the check, it must be alleged and proved that at the time of presentation and demand of payment the paper was duly indorsed by the payee.<sup>5</sup>

<sup>3c</sup> *Eichner v. Bowery Bank*, 24 App. Div. (Hun, N. Y.) 63, is *contra* to the foregoing proposition, and holds that a banking corporation, being a corporation, cannot talk, and that there can be no agency to slander. See *Hilton v. Jesup Banking Company*, 128 Ga. 30, 57 S. E. 78, 11 L. R. A. (N. S.) 224, n. (1907).

<sup>4</sup> *Rolin v. Steward*, 14 C. B. 594; *Bank of Commerce v. Goos*, 39 Neb. 438, 58 N. W. 84; *Atlanta National Bank v. Davis*, 96 Ga. 336, 23 S. E. 190; *Columbia National Bank v. MacKnight*, 29 App. Cas. (D. C.) 580 (1907); *Hilton v. Jesup Banking Company*, 128 Ga. 30, 57 S. E. 78, 11 L. R. A. (N. S.) 224, n. (1907).

<sup>4a</sup> *Wood v. American National Bank*, 100 Va. 306, 40 S. E. 931 (1902).

<sup>4b</sup> *Winkler v. Citizens' State Bank*, 89 Kan. 279, 131 Pac. 597 (1913); *American National Bank v. Morey*, 113 Ky. 857, 69 S. W. 759, 101 Am. St. Rep. 379, 58 L. R. A. 956 (1902).

<sup>5</sup> *Eichner v. Bowery Bank*, 24 App. Div. (Hun, N. Y.) 63.



§ 459. **Bank's Defences.**<sup>0</sup>—To the customer's suit for damages the bank may answer in defence, that it had not unpledged funds enough belonging to the customer to pay the check or draft in full at the time of presentment and demand.<sup>0a</sup> For a bank is never held to make a partial payment upon a check.<sup>1</sup> So if the bank has accepted, or in any manner pledged itself or made itself liable to pay checks, drafts, or orders of the same drawer to such an extent that, after reserving enough to meet their obligations, the balance to his credit would not suffice to meet the check in full, the bank need not, indeed must not, make any payment at all upon the same.<sup>2</sup> But if the bank itself at the time holds the promissory note or other business paper of the customer, which has not yet matured, it has no right to set aside funds enough to secure the payment of this when it shall mature, and then to refuse payment because the balance after such appropriation does not equal the sum drawn for. It is only under authority of a court of equity that a bank can claim any lien on funds of its depositor to secure paper of his held by it, and still undue. Further, it is a good de-

<sup>0</sup> § 459. A bank is not negligent when it pays a depositor's check written on the form of another bank. *First State Bank v. Vogeli*, 78 Kan. 264, 96 Pac. 490 (1908).

<sup>0a</sup> But the fact that the books show a lack of funds because of clerical error in bookkeeping can only be shown in mitigation of damages. *Spearling v. Whitney-Central National Bank*, 129 La. 607, 56 So. 548 (1911); *Levin v. Commercial etc. Bank*, 133 La. 492, 63 So. 601 (1913); *Wood v. American National Bank*, 100 Va. 306, 40 S. E. 931 (1902); *Clark Company v. Mount Morris Bank*, 85 App. Div. 362 (1903), 83 N. Y. S. 447, affirmed in 181 N. Y. 533, 73 N. E. 1133.

The application by the bank of the funds of the depositor in extinguishment of his past due obligations to the bank is no defence, in the absence of notice to the depositor. *Callahan v. Bank of Anderson*, 69 S. E. 374, 48 S. E. 293 (1904). Nor can the bank set up as a defence against the depositor the interest of a third party unless it is negligent in notifying its customer of the adverse claim and of its intention to protect itself by retaining out of the amount standing to his credit a sum sufficient to meet the claim. *Jaselli v. Riggs National Bank*, 36 App. Cas. (D. C.) 159, 1912C Ann. Cas. 119, n., 31 L. R. A. (N. S.) 763, n.

But when the bank returns a check marked "payment stopped" it is not estopped to deny that it had sufficient funds of the drawer to meet it, nor does such relieve the holder from proving that the bank did have sufficient funds. *Hamilton National Bank v. Franklin*, 140 Ill. App. 608 (1908).

<sup>1</sup> In the *Matter of Brown*, 2 Story, 512; *McKnight v. Bank of Acadia*, 114 La. 289, 38 So. 172 (1905); *Rauch v. Bankers' National Bank*, 143 Ill. App. 625 (1908); *Bloom v. Winthrop State Bank*, 121 Iowa 101, 96 N. W. 733 (1903).

<sup>2</sup> *Kymer v. Laurie*, 18 L. J. Q. B. 218.

fence if the bank shows that funds of the drawer sufficient to make his credit good to meet the amount of the check had been paid into the bank so immediately before the presentment of the check, that the bank had not had a reasonable time to avail itself of the deposit. What is such reasonable time will depend upon the circumstances of each individual case. The general magnitude of the business of the bank, and especially the amount of business which happened to be transacting in the bank in the interval between the deposit and the presentment, also doubtless the organization and system of the bank in relation to such matters, the numerical strength and arrangement of its clerical force, and other similar matters, may be put in evidence by either side to sustain its position. Ordinarily, reasonable time would seem to be only till the bank could have a fair opportunity to "avail itself" of the funds; that is to say, get them into a condition such that it can mingle them with its general funds, and use them as money, and to communicate the fact of the deposit to the proper clerks.<sup>3</sup> In *Rolin v. Steward* a deposit was made at one o'clock, the check was presented at three o'clock on the same day, and the interval was held to be such a reasonable time that the banker was obliged to pay damages for refusing to cash it, though he remarked at the time that it might very probably go through the clearing-house the next day, and though in fact he did pay it on the next day.

Precisely what is the signification of the requisition that the bank should have time "to avail itself of" the funds deposited, is clearly indicated by no judicial decisions. If the funds be current money, native gold or silver coin, for example, simple receipt thereof and time to notify the paying clerks is sufficient. So doubtless if they be bank bills or notes, provided they be in general circulation in the community for the full value expressed on their face. If A. deposit with his banker the check of B., also drawn on the same banker, time enough to examine the account of B., and if it be good for the amount to transfer the same to the credit of A., would also doubtless be a reasonable time. But if A. deposit in his bank the check of B. drawn on another bank, the naked unqualified rights of the bank certainly must cover a much longer period. In such a transaction A. simply makes the bank his agent

<sup>3</sup> Grant on Bankers and Banking; *Whitaker v. Bank of England*, 6 Car. & P. 700; 1 C. M. & R. 744; *Marzetti v. Williams*, 1 Barn. & Ad. 415; *Rolin v. Steward*, 14 C. B. 595. See *Jaselli v. Riggs National Bank*, 36 App. Cas. (D. C.) 159, 1912C Ann. Cas. 119, n., 31 L. R. A. (N. S.) 763, n.

for the collection of the check, with the understanding, express or more usually implied, that the amount when collected shall be placed to his credit. The bank of deposit has the ordinary time allowed for presenting the check to the drawee bank and demanding payment; a time which by the ordinary rule of the common law extends to the close of banking hours on the day following that of the deposit, but which may be restricted to a less period by the usage of the clearing-house. Then the credit is or is not given to the depositor, according as the check is or is not honored.

A bank may be justified in refusing to pay a check although its books show a sufficient credit to the drawer. It is the actual state of the account — the state it would be in were all checks, etc., entered on the books — that determines the duty to pay checks.<sup>4</sup>

A bank has a right to refuse the payment of a check drawn against a special deposit when it is not drawn for the purpose of paying bills for which the deposit was to be used.<sup>5</sup> And when money has been deposited in a bank subject to a condition that it shall not be paid to a vendor of property until the title thereof has been examined and found to be good, the money is placed beyond the control of the purchasers and withheld from the vendor, and until notified of the failure or the fulfilment of the condition, the bank is not liable for refusal to honor the check of the purchaser drawn thereon.<sup>6</sup> Also when the money deposited in the name of W. comes from the sale of mortgaged property under an agreement by which the money was to be divided between W. and the bank, the bank is justified in refusing to honor a check calling for W.'s balance as shown on the books.<sup>7</sup>

A bank has a right to decline to pay a check until it is presented in the way the drawer of the check has ordered, and if the directions are to pay through a specified bank the drawee bank may refuse to pay when presented directly by a third bank.<sup>8</sup>

When money in a bank has been paid to the lawful owner

<sup>4</sup> *American Exchange National Bank v. Greggs*, 138 Ill. 596, 28 N. E. 839; *Gore Bank v. Royal Canadian Bank*, 13 Gr. Chy. R. (Can.) 425.

<sup>5</sup> *Stephens v. Chehalis National Bank*, 80 Wash. 254, 141 Pac. 340 (1914).

<sup>6</sup> *Holliday v. Hammond State Bank*, 116 La. 890, 41 So. 198 (1906).

<sup>7</sup> *Winklebleck v. Butler County Bank*, 151 Mo. App. 9, 131 S. W. 905 (1910).

<sup>8</sup> *Farmers' Bank v. Johnson*, 134 Ga. 486, 68 S. E. 85, 30 L. R. A. (N. S.) 697, n. (1910).

thereof it is a good defence to a claim by one who deposited the money in his own name.<sup>9</sup>

But a bank is not justified in refusing to pay a check for the reason that the drawer has previously served a sentence in the penitentiary or that the check was drawn payable to the order of his attorney.<sup>10</sup> And when a bank receives a check as money and places the amount thereof to the credit of a customer and by its course of dealings authorizes its customer to issue checks, it is no defence, after a check drawn by the customer has come into the hands of an innocent holder, to show that the original check was a forgery.<sup>11</sup>

§ 460. **Possession of Paid Checks.**—When the bank has paid the check of a depositor, it is considered to be entitled to possession of it, as a voucher for the payment,<sup>1</sup> and such possession is *prima facie* evidence of payment in accordance with the terms of the check.<sup>1a</sup> But this right to possession is not absolute and valid as against all parties. It is rather a right to demand and take the check from the holder, than a strict right to possess the same. It is the custom with most banks, whenever the depositor sends his book to be balanced, to return to him with it all the checks received and paid to the date of the balancing. An obligation to do this might perhaps be inferred in most cases from the usage of business and the prior course of dealing between the bank and the depositor. For it is probable that the habit is almost universal, and it is one which may be properly adduced in evidence.<sup>2</sup> But further than this, there is ground for holding that it is also a duty of the bank at common law to return his paid checks to the de-

<sup>9</sup> *Parker v. Kniekerbocker Trust Co.*, 137 App. Div. 719 (1910), 122 N. Y. S. 521; *France Milling Co. v. First National Bank*, 138 App. Div. 645 (1910), 122 N. Y. S. 736.

<sup>10</sup> *Columbia National Bank v. MacKnight*, 29 App. Cas. (D. C.) 580 (1907).

<sup>11</sup> *Robinson v. Bank of Pikeville*, 146 Ky. 538, 142 S. W. 1065, 37 L. R. A. (N. S.) 1186, n. (1912).

<sup>1</sup> § 460. In the *Matter of Brown*, 2 Story, 512; Byles on Bills, p. \*21, Sharswood's note; Daniel, Neg. Inst., § 1649; *Leonora National Bank v. Rayland*, 128 Ky. 548, 108 S. W. 854 (1908). See *Hanna v. People's National Bank*, 182 Ill. App. 528 (1913).

But the payee need not indorse the check in blank as a voucher for the payment. *Osborn v. Gheen*, 16 D. C. 189.

<sup>1a</sup> *Pickle v. Muse*, 88 Tenn. 383, 12 S. W. 919; *Patterson v. First National Bank*, 73 Neb. 384, 102 N. W. 765 (1905); *Leonora National Bank v. Rayland*, 128 Ky. 548, 108 S. W. 854 (1908).

<sup>2</sup> *Regina v. Watts*, 2 Den. (Crown C.) 14 (p. 21).

positor. He is considered to have the better right to them, for they are regarded as his evidence of payment of his debt to the payee named in them. The bank is said to hold them only as his agent.<sup>3</sup> So far is this doctrine carried, that secondary evidence of the contents of a check cannot be introduced on the ground that the bank has possession of it; the bank, of course, not being a party to the case. Also notice to one to produce a check is sufficient, though it is in his banker's hands after payment. But at the same time there seems to be authority as well as reason for saying, that if the general right of property is in the drawer, yet a qualified right of property, or it may more properly be called a temporary right of possession, exists in the bank. A paid check can only be the subject of any value whatsoever for the purpose of serving as an item of evidence. In this capacity it has a double purpose to subserve. It is proof that the drawer has paid his indebtedness to the payee, but it is likewise proof that the bank has paid the sum named on account of the drawer. If the drawer is entitled to claim perpetual possession of it to protect him against the danger of a suit by the payee, so the bank, before giving it to the drawer, is entitled to his acknowledgment, express or implied, that it has rightfully paid that amount out of his credit or deposit. For this reason, the return of the check is usually contemporaneous with the balancing of the books; that is to say, with the statement of account rendered to the customer charging him with this item. Before the drawer can enforce delivery of the check to himself by the bank, he ought to be required, by his acknowledgment of the bank's payment, to render the check no longer essential to the bank as its only evidence of that payment. The law of the matter may be very well gathered from the case of *Regina v. Watts* (*supra*), where the arguments offered by counsel and the answers of the judges thereto, bring out the various points with great clearness.

*If Check is Overdraft, Bank may Retain till its Claim against Drawer is Settled*

The general rule, as stated, is based, of course, on the ordinary presumption that the check was drawn against and paid from a deposit of the drawer sufficient for the purpose. In the exceptional

<sup>3</sup> *Regina v. Watts*, 2 Den. (Crown C.) 14; *Burton v. Payne*, 2 Car. & P. 520; *Partridge v. Coates, Ry. & Mood*. 153; *Grant on Bankers and Banking*.

cases where the check of one who has not any funds, or not funds enough to meet it in full, is paid by the bank, since the check may be the main link in the chain of proof of the bank's claim for repayment, it is fair to suppose that the rule would be so far modified as to allow the bank to retain the check, like a promissory note, as the evidence of indebtedness, until the indebtedness is discharged. So if an intention or understanding could be shown to the effect that the check should remain in the banker's hands, after his payment upon it, as a kind of security upon which he might, if need should be, proceed against his depositor, clearly this intent of the parties would override the general rule until such time as the banker should have been reimbursed.<sup>4</sup> Grant says that in case of an overdraft the banker might have a "right to retain the checks, because to part with them would be to put beyond his control the only conclusive evidence he might have of the loan, beyond the entries in his own books corresponding with the checks, which would be perhaps open to the objection, that to let them in would be to allow the making of evidence in a man's own favor."<sup>5</sup>

§ 460 A. **Checks on other Banks.** — It has been declared not to be in the ordinary course of business for a bank to pay in cash over its counter a check drawn on another bank, although such check be indorsed by the payee, and the payee is a customer of the paying bank. Properly speaking, it is said, such a check ought to be deposited for collection, and the depositor should draw his own check for whatever amount he wants. If the bank does so cash the check, and there proves to be anything wrong about it, the bank stands at the disadvantage always attendant upon having done an act not in the ordinary course of business.<sup>1</sup> The transaction is said to be too much like the *purchase* of a check, which a bank has no right to make.

It must be remarked, however, that the purchase of a check, if for full value, is proper, according to the best authority, and that there is no objection ever raised to a deposit of checks on other banks, credit given and made absolute (by agreement, or by implication in some jurisdictions), and drawn against; yet this is substantially a purchase.

<sup>4</sup> Grant on Bankers and Banking, and cases cited, which, however, it must be confessed, at best leave this principle to be inferred, and are far from distinctly enunciating it.

<sup>5</sup> Grant on Bankers and Banking.

<sup>1</sup> § 460 A. *Bristol Knife Co. v. First National Bank of Hartford*, 41 Conn. 421.

## CHAPTER XXXIII

### FORGERY OF CHECKS

See Forgery of Bills, §§ 633, 659.

A. THE PRINCIPLES chiefly to be kept in mind are, —

- (1) Forgery can carry no title even to a *bona fide* holder; otherwise, any man might be forged out of house and home, and rendered a pauper without an act upon his own part. No one would have any security for a moment.
- (2) If negligence or want of ordinary care and prudence produces loss, the law will put the burden upon the one who is guilty of the carelessness.
- (3) Negligence alone can give no one a claim against the party remiss; there must also be *loss naturally resulting from the negligence*, and resulting to the person who makes the claim. Great confusion has arisen by failure to remember this elementary principle.
- (4) When two parties are equally negligent, the one guilty of the primary neglect should bear the loss; as where a bank pays on a forged indorsement, the genuineness being a fact equally within the reach and duty of inquiry by both parties, and the holder's neglect being prior to that of the bank, he must, as between himself and the bank, bear the loss. (If the two negligences enter equally into causation of the loss, and are not distinguishable as to priority and dependence one on the other, but are independent, neither one having opened the door for the other, it would seem just that the loss should be *divided*, and the idea might very well be applied to any case where the negligences are equal, and each one essential to the loss, for the real object of the law should be to repress negligence, and to distribute loss in *proportion* to the manifestation of qualities detrimental to society and producing the loss, and this would require that neither negligent party should escape a portion of the burden, into the causing of which his fault entered as a factor.) The law has not as yet adopted the latter rule, though there is a tendency in this direction, especially in Illinois.

§ 468. (5) Whoever pays a check, knowing it to be a forgery, or issues, ac-  
§ 478. knowledges, or certifies it with such knowledge, binds him-  
self.

B. AS BETWEEN THE BANK AND THE DRAWER.

For the drawer's duty, and what will make him liable, see  
B. 1, c and d, and B. 3, a.

## FORGERY OF CHECKS

### (1) Forgery of the drawer's signature.

- § 463. (a) The old rule was that the bank was bound to know the drawer's signature. The money could not be recovered from the person to whom it was paid by the bank, and the drawer could not be charged with the amount, nor was he bound to any diligence in examining his accounts or checks returned to him from the bank.
- § 467.
- § 464. (b) This rule is unreasonable and in violation of the third principle above, and has been and is being replaced by
- § 466. (c) The better rule, which is, that although the bank may be negligent in not discovering the forgery of the drawer's signature, yet if the person to whom it paid the money would not be in a worse position by correction of the mistake than if payment had been refused by the bank, the bank may recover the money thus paid in mistake of fact. And further, that the drawer is bound to exercise ordinary care and diligence in the examination of his accounts with the bank and the vouchers returned to him. He may do this personally or through an agent, and if the agent is negligent, his fault is imputable to the drawer; but the crime of a clerk in forging his principal's name cannot be imputed to the principal, nor his guilty knowledge, but only such knowledge as an honest and ordinarily careful clerk could obtain by examination of the accounts and vouchers.
- § 473. (d) The drawer's duty does not extend beyond reasonable ordinary care, and he is not obliged to make immediate examination. Mere silence after receiving his bank-books and checks will not make him responsible unless guilty of neglect, nor will careless habits as to leaving his check-book, stamp, etc., easily accessible make him liable.
- § 470.
- § 470 A.
- § 468. Even if he pronounces his signature to be genuine, he may afterward protect himself by proving the forgery, except against one who has acted on the faith of his representation, or except he knew at the time he adopted the signature that it was forged.
- § 479.
- § 474. (e) If the drawer is guilty of neglect, opening the door to the fraud, or if he
- § 471.
- § 477. Ratifies the payment, or
- § 468. Issues the paper with the forgery on it, the bank can charge him with the amount paid on it.

### (2) Forgery of an indorsement.

- § 474 a. The bank must pay according to the drawer's directions, and if it pays upon the order of any person other than the one designated by the drawer, it cannot charge the drawer with the payment, unless
- § 474 e. The drawer has been guilty of the prior neglect in causing the loss, or has ratified the payment. § 471.
- § 474 c. When the bank pays to a person of the same name as the real payee, if it has used all the means of identification given it by the drawer, it should not be held; but the law wavers on this point between common sense and technicality.



## FORGERY OF CHECKS

§ 474 *b.* By statute in England, an indorsement apparently correct is authority to the bank to pay.

§ 474 *c.* Drawer's duty, and what circumstances may make him liable. See B. 1, *d*, and B. 3, *a*.

### (3) Fraudulent alteration of checks.

§§ 469, 480. (*a*) Money paid in such cases is the bank's loss, unless the

§ 474 *c.* drawer's negligence was contributory, or he has

§§ 477, 46. rendered himself liable by adopting the check, or

§ 471. ratifying the payment, or has estopped himself by

subsequent neglect of due care in examination, or

§ 472. in giving notice of the forgery when known.

### C. AS BETWEEN THE BANK AND THE TRUE OWNER.

Paper paid on forged indorsement.

§ 474. The generally adopted doctrine is that the true owner can sue the bank and recover the money, for a forged indorsement can give no title, and payment to one who had no right to receive cannot discharge the duty of the bank to pay the one who has a right to receive; and although a check-holder cannot in some States sue the bank until acceptance, it is usually held that payment of the check amounts to acceptance of it, and the bank thereafter holds the amount for the true payee.

The United States Supreme Court, however, deny the payee's right of action, holding such payment not an acceptance.

### D. AS BETWEEN THE BANK AND THE PERSON RECEIVING THE MONEY.

(1) If the drawer's signature is forged, the bank, having better means of information than the holder, is deemed guilty of the greater negligence in failing to discover the forgery, and can only recover if the holder would be in no worse position by correction of the mistake than if payment had been refused when the check was presented at the bank.

(2) If an indorsement be forged, the parties being equally bound to inquire, having equal means of information, and the neglect of the holder being prior, the bank may recover, except where the drawer has rendered himself liable on the paper (and then the bank has no need to recover of the holder, for it can charge the drawer), and except cases in which the holder took the check subsequently to its certification by the bank.

§ 474. It is no objection to recovery, that the holder has suffered by delay in discovering the forgery.

(3) If the check is fraudulently certified, and, on being shown to the teller, is pronounced good by him, it is equivalent to an original certification, and the bank cannot correct the mistake if the holder has acted or omitted to act on the faith of it.

(4) If a check is fraudulently altered,  
§ 479. (*a*) After signature, the bank can recover of the holder.  
If a check is raised after certification,

(*b*) Though it is negligence in the bank not to know its own obligation, yet it may recover the excess paid,

## FORGERY OF CHECKS

- § 481. unless an innocent party would be prejudiced, and put in a worse position by correction of the mistake than if the bank had refused to pay the excess.
- (c) If a check is raised before certification,  
The rule generally adopted is, that certification warrants only the drawer's signature and funds, and any excess paid on a check raised before certification may
- § 482. (d) be recovered, unless the drawer negligently left the door open for the alteration.
- § 482. (e) But the bank must not intentionally or carelessly do anything to mislead the holder, nor neglect the customary references to sources of information in its possession.
- § 482. (f) And in Louisiana, it is held that a holder taking after certification takes on faith of the bank as to the amount, as well as to the signature and the existence of funds.
- (5) An indorsement or transfer of negotiable paper warrants its genuineness, and on this ground the bank may recover of the transferrer at any time the forgery may be discovered, and the transferrer may then recover from his transferrer; no notice of dishonor, according to the ordinary rules of the law merchant, is necessary in such cases.
- § 477.  
§ 487. (6) Special circumstances.
- § 466 b. Usage for the first bank taking paper to inquire as to its genuineness. The drawee can recover, if the taking bank failed to follow the usage.
- § 466 f. If the holder failed to impart suspicious facts, or failed to require proper identification of the party from whom it
- § 466 g. took the paper, or was guilty of any contributory negligence whatever, the drawee may recover.
- § 466 a, b, c, d. (7) Pennsylvania statute law has adopted the modern doctrine expressly; holding that the bank may recover from the holder in all cases except where the holder is innocent of primary or contributory neglect, and the bank's neglect, if corrected, would prejudice such innocent person.
- § 466 h.

### E. TIME.

- § 487. Some cases held that the forgery must be discovered in time to allow of the notification of prior parties within the regular period for notice of dishonor.
- § 488. But the better doctrine is, that no length of time will prevent recovery if notice is given promptly upon discovery, and even the United States government is subject to this rule; the maxim that no laches can be imputed to the sovereign will not save it. A right of recovery never arises except on condition of promptness. § 489 e.
- §§ 487-489. Every transferrer warrants the genuineness of negotiable paper transferred, and no notice is necessary to charge previous parties when the paper turns out to be void. § 487.

### F. AS BETWEEN THE BANK AND THE PURCHASER.

- § 483. (1) Of a draft, there is no right of recovery on account of the raising of the draft after leaving the hands of the purchaser.
- (2) Suspicion.
- § 484. The character of an alteration as being suspicious or not

depends on the significance of the words erased or altered, not on the fact of their being printed or written.

(3) **Material.**

The alteration must be material.

- § 485. (a) An alteration in date may be material.  
 (b) An alteration in the figures is not.  
 (c) Erasing a signature and rewriting the same is forgery.  
 (4) If a check signed in blank is fraudulently filled up, the loss must fall on the one who ran the risk of executing the instrument in blank.

### Forgery of Signature

§ 462. **Comparison of Bills and Checks.** — Where a forged check is presented to the bank upon which it purports to be drawn, and is paid by that bank, the question as to who shall bear the loss arises, as between the bank, the payee, and the drawer, so soon as the forgery is discovered. An examination of the cases will show that the law, or rather the practical application of the law, concerning this matter, has undergone a gradual but very substantial change. In the discussion of the subject, the authorities concerning bills of exchange and checks must be regarded as being in nearly all instances interchangeable. The only important distinction lies in this: that if a forged bill be presented by the payee to the drawee for acceptance, and he accepts it, and thereafterward it changes hands, and before maturity comes into the possession of some third party, *bona fide* and for value, the acceptor is estopped to defend on the ground of the forgery of the drawer's signature; for the bill having been properly presented to the drawee as being presumably the person best able to determine its genuineness, and he having given to it credit and currency by his acceptance, he has thus by his own act led other persons into their subsequent acts, and those who have received the instrument upon the strength of his representations are entitled to recover from him its apparent value. The person who holds an uncertified check occupies the position of the payee of the bill, not of the person who, subsequently to acceptance, becomes the purchaser of the accepted bill. Yet there is one particular in which there must often be a substantial difference between them. The bill is presented for sanction or repudiation to the only person presumably able to determine its genuineness. His acceptance gives it value, credit, and currency. People are governed in their actions by their faith in his representation. The bank which pays a check does not assume precisely this position. It

must, however, not unfrequently come within the *logic* of the rule. For the matter of payment or non-payment may often be the cause of some action or inaction on the part of the payee, which would give him an equal equity with that of the person who acts or refrains from acting upon the strength of the acceptance of the bill or draft.<sup>1</sup> The certification of a check corresponds closely with the acceptance of the bill, and, as will be seen farther on, is governed by the same rules.

There is some slight ground for supposing that the rule would be construed with even greater stringency against a bank which had paid a forged check or bill of a customer, than against an individual drawee who had paid a forged bill. For it may be supposed that, in the ordinary course of business, it must generally happen that a bank has vastly more frequent opportunities for becoming acquainted with a depositor's signature than a mere business correspondent can have. At any rate, this seems to be an argument which the courts will hear and consider. For instance, in *Smith v. Mercer (post)*, the court said: A banker "is even more bound to know a customer's handwriting than a drawee is bound to know a drawer's."

*Forgery of Signature, Bank v. the Person receiving the Money*

§ 463. **The Old Rule**, which has been frequently and positively reiterated in England and in the United States, is, that the banker is bound to know the handwriting of his customer; <sup>o</sup> the drawee is bound to know the signature of his drawer. Whence it follows that, if the banker or drawee makes a payment or gives credit upon the strength of a forged signature, the loss must be his as between himself and the holder. The blunder is his; he has not known what he is bound to know. Having parted with his money by reason of his own culpable negligence, he cannot be permitted to recover it back again when he afterward discovers his error. Thus said Chief Justice Mansfield, in a case <sup>1</sup> which arose in 1762,

<sup>1</sup> § 462. *Bank of St. Albans v. Farmers & Mechanics' Bank*, 10 Vt. 141; *Price v. Neal*, 3 Burr. 1355.

<sup>o</sup> § 463. But only when the writing appears to be the signature of the drawer of the check purporting to be signed by the customer, and not when the writing appears as an indorsement of a check, or anywhere on the paper other than drawer. *Missouri etc. Trust Co. v. Third National Bank*, 154 Mo. App. 89, 133 S. W. 357 (1910).

<sup>1</sup> *Price v. Neal*, 3 Burr. 1355. See also the earlier cases, *Wilkinson v. Lutwidge*, 1 Str. 648; *Jenys v. Falwer*, 2 Str. 946; and the later cases,

concerning a forged bill of exchange. A drawee had paid one bill which had been drawn against him, and had accepted and subsequently paid a second bill. Both bills had been forged by one Lee, who, as the reporter casually remarks, "has since been hanged for forgery." The drawee sued the holder to recover back the money paid. His Lordship stopped the defendant's counsel short, saying that the case was one of that description that could never be made plainer by argument. "It was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand, before he accepted or paid it. But it was not incumbent upon the plaintiff to inquire into it. . . . The plaintiff made no objection to them at the time of paying them. Whatever neglect there was, was on his side. . . . It is a misfortune which has happened without the defendant's fault or neglect." It was too late for the plaintiff to seek to mend matters after he had "lain by till the forger had come to be hanged."

This has since been a leading case. Mr. Justice Story, in 1825, said of it, that it "has never since been departed from; and in all the subsequent decisions in which it has been cited, it has had the uniform support of the court, and has been deemed a satisfactory authority."<sup>2</sup> In *Goddard v. Merchant's Bank*,<sup>3</sup> Ruggles,

*Smith v. Chester*, 1 D. & E. 655; *Barber v. Gingell*, 3 Esp. 60; *Bass v. Clive*, 4 Maule & S. 13; *Smith v. Mercer*, 6 Taunt. 76; *Forster v. Clements*, 2 Camp. 17; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Weisser v. Denison*, 10 N. Y. 68; *The Commercial & Farmers' National Bank of Baltimore v. The First National Bank of Baltimore*, 30 Md. 11; *Bernheimer v. Marshall*, 2 Minn. 78; *First National Bank v. Ricker*, 71 Ill. 439; and other American cases cited *post* in this discussion. *Missouri etc. Trust Co. v. Third National Bank* 154 Mo. App. 89, 133 S. W. 357 (1910); *Yarborough v. Banking etc. Co.* 142 N. C. 377, 55 S. E. 296 (1906); *Jones v. Miners etc. Bank*, 144 Mo. App. 428, 128 S. W. 829 (1910) (the court calls the rule harsh and intimates that the more modern rule of other courts is more equitable). But the rule now prevails in most states through the adoption of the negotiable instruments law. *National Bank v. Mechanics' American National Bank*, 148 Mo. App. 1, 127 S. W. 429 (1910).

If the depositor is free from blame and has done nothing to mislead the bank all the loss must be borne by the bank. *Kenneth Investment Co. v. National Bank*, 103 Mo. App. 613, 77 S. W. 1002 (1903); and a purchaser is not guilty of such negligence as to authorize recovery against him when he has knowledge of circumstances sufficient to put a prudent man on inquiry. *National Bank v. First National Bank*, 141 Mo. App. 719, 125 S. W. 513 (1910); *National Bank v. Mechanics' American National Bank*, 148 Mo. App. 1, 127 S. W. 429 (1910).

<sup>2</sup> *Bank of the United States v. Bank of Georgia*, 10 Wheat. 333, 6 L. ed. 334.

<sup>3</sup> 4 Comst. (N. Y.) 147.

J., in an opinion in which he agreed with his colleagues as to this principle, though dissenting as to its application in that especial case, remarked that this general rule "should not be departed from or frittered away by exceptions resting on slight grounds, and cannot be overruled without overthrowing valuable and well-settled principles of commercial law." In a subsequent case, *Allen, J.* quotes this language with approbation, and says: "A rule so well established and so firmly rooted and grounded in the jurisprudence of the country ought not to be overruled or disregarded. It has become a rule of right and of action among business men, and any interference with it would be mischievous."<sup>4</sup> *Price v. Neal* has never yet been "overruled", but whether it has been "frittered away" is a question which the reader must answer for himself when he concludes this discussion. Judge Phelps, of Vermont, has criticised it as being too sweeping, according to modern interpretations of the law. Lord Mansfield "entertained the opinion that there was no remedy against a person who should innocently put off a forged security. . . . On the contrary, it seems now well settled, that a person giving a security in payment, or procuring it to be discounted, vouches for its genuineness."<sup>5</sup> This rule, however, has never, to our knowledge, been extended to the case where the Party, when receiving or discounting the paper, is presumed, from his relation to it, to have the means of correct knowledge as to its genuineness, or where it has been kept for an unreasonable time without notice to the other party of its spurious character."<sup>6</sup> These remarks intimate the manner in which the breadth of the rule has been pared down.

The earliest case in this country is that of *Levy v. Bank of the United States*.<sup>7</sup> The plaintiff deposited a check, purporting to be drawn upon the same bank in which he deposited it by another depositor in that bank. He received credit for the amount of it in his cashbook in the usual form. On the afternoon of the same day it was discovered to be a forgery, and was at once returned to him. Thereupon the bank refused to recognize the credit; the depositor sued to recover the sum, and obtained a verdict, which the Supreme Court declined to interfere with. The ac-

<sup>4</sup> *National Park Bank v. Ninth National Bank*, 46 N. Y. 77.

<sup>5</sup> See *Cabot Bank v. Morton*, 4 Gray (Mass.), 156.

<sup>6</sup> *Bank of St. Albans v. Farmers & Mechanics' Bank*, 10 Vt. 141.

<sup>7</sup> 4 Dall. (Pa.) 234; 1 Binn. (Pa.) 36; and see statement of this case in *Bank of the United States v. Bank of Georgia*, 10 Wheat. 333, at p. 354, 6 L. ed. 334, 340.

ceptance of the check by the defendant, and giving credit therefor, were held to conclude the defendant, although the case *in its favor was a very strong one, by reason of the prompt discovery of the forgery, and notification thereof within the same day.* The court rely upon the rules governing bills of exchange, but remark further, that the modern cases notice another reason for the defendant's liability, "which we think has much good sense in it; namely, that the acceptor is bound to know the drawer's handwriting, and by his acceptance to take this knowledge upon himself."

It may be remarked here, that the giving credit by a bank to its depositor upon a false check upon itself deposited by him is, in law, equivalent to an actual payment. Besides the foregoing case, all the authorities, no less than the simple reason of the thing, are conclusive upon this point.<sup>8</sup>

### *Bank's Negligence*

In like manner, where a clerk had authority to draw checks, signing his employer's name thereto, for a stated period, and the bank had notice of the limitation of time, but the clerk continued to draw checks in the same manner after the lapse of that time, it was held that the bank could not charge the depositor with the amount of any checks paid by it which had been drawn by the clerk after his authority had expired.<sup>9</sup>

This view has been taken by the court of Minnesota, in a very sound, just, and well-reasoned opinion.<sup>10</sup> *Goddard v. Merchants' Bank* (*post*, § 465) is doubted, criticised, and not followed; it is regarded as being not in accord with the authorities or with common sense. If the drawee chooses to pay the draft without being at the trouble to inspect it, he has only himself to blame if he pays upon a forgery; he is guilty of such neglect as would preclude him from recovering from the innocent payee or presenter. Were the law otherwise, no drawee would ever look at any draft, but would take good care to have it paid only upon inspection by his clerk, so as to keep the door open for a recovery in case of forgery.

<sup>8</sup> See *National Bank of North America v. Bangs*, 106 Mass. 441; *Bank of St. Albans v. Farmers & Mechanics' Bank*, 10 Vt. 141.

<sup>9</sup> *Manufacturers' National Bank v. Barnes*, 65 Ill. 69.

<sup>10</sup> *Bernheimer v. Marshall*, 2 Minn. 78.

*Bank cannot Recover from Holder*

A bank cannot recover money paid on a forgery of the drawer's name, from the person to whom it was paid. The bank is bound to know the signature of the drawer.<sup>11</sup>

*No Recovery when Drawer's Signature Forged*

A case arose in Vermont as follows. A check, payable to "J. W. or bearer", was presented to a bank, not being the bank on which it was drawn, with the request that the bank would purchase it. The bank did so, and J. W. indorsed the check over to the cashier. It was duly paid, or credited in account, by the bank on which it purported to be drawn, but afterward was discovered to be a forgery; whereupon the drawee bank sued the purchasing bank to recover back the amount. The plaintiffs asked for an instruction, that, if the jury should find that the cashier of the purchasing bank received the check without due circumspection or the exercise of due diligence in ascertaining its genuineness or the title of the person presenting it, the plaintiffs were entitled to recover. The instruction was not given, and exceptions taken by the plaintiff were not sustained. The court thought it necessary only that the defendants should appear to have received the check in the ordinary course of business and in good faith. That receiving it without any especial inquiry sufficiently satisfied these requirements was not seriously doubted.<sup>12</sup>

In a Maryland case there was evidence of a custom similar to that offered in the case of *Ellis v. Ohio Life Insurance & Trust Co.* *post*, § 466 (b); but the court said: "We do not mean . . . to decide that a case may not arise in which bank officers and agents may, in receiving a check, act in a manner so grossly negligent, even without *mala fides*, or by their conduct so mislead and lull into security the bank called upon to pay, as to excuse its failure

<sup>11</sup> *National Bank of Commonwealth v. Grocers' National Bank*, 35 How. Pr. (N. Y.) 412; *Neal v. Coburn*, 92 Me. 139, 42 Atl. 348; *Deposit Bank of Georgetown v. Fayette National Bank*, 90 Ky. 10, 13 S. W. 339; *First National Bank of Belmont v. First National Bank of Barnesville*, 58 Ohio St. 207, 50 N. E. 723; *National Bank v. First National Bank*, 141 Mo. App. 719, 125 S. W. 513 (1910). The bank may recover from one who is not a *bona fide* holder of the check. *Pennington County Bank v. First State Bank*, 110 Minn. 263, 125 N. W. 119, 136 Am. St. Rep. 496, 26 L. R. A. (N. S.) 849 (1910).

<sup>12</sup> *Bank of St. Albans v. Farmers & Mechanics' Bank*, 10 Vt. 141.



to immediately detect the forgery, and where a jury may very properly be allowed to pass upon such conduct and negligence as most essentially facilitating the fraud, and occasioning the loss, and find a verdict accordingly. But in view of the long series of decisions settling the law so as to protect innocent holders for value, a much stronger case must be made out than is presented by this record. There is no pretence of bad faith on the part of the defendant. It received the check in the ordinary course of business, and sent it through the usual channel for payment. We cannot sanction so loose a doctrine as to hold that the fact that it came through the clearing-house affords any shadow of excuse to the plaintiff. The law attaches no sanctity to this source of communication, and none in fact can be imputed to it. The legal effect of what was done here, as in every case of presentment and demand, is this: the defendant said to the plaintiff, 'We hold this check on your bank, purporting to be drawn by one of your customers, and demand its payment'; and it can make no difference through what source this demand was made, whether by letter or by special messenger, or through the clearing-house."<sup>13</sup>

In an Ohio case, a person owing money to A. gave a check, payable to the order of A., to a person unknown to him to be A., but who said that he could identify himself at the bank as A. It was held that the drawer had been guilty of no such negligence as would render him liable to the bank which had paid the money to the person to whom the check was delivered, without requiring him to prove himself to be A.; the fact being that this person was not A., and had forged A.'s indorsement.<sup>14</sup> If the laches of the maker of the check was not at least as great in this case as that of the defendants in *National Bank of North America v. Bangs* (*post*, § 466, *d*), it is difficult to see in what laches consists.

The following case, though a just judgment on the facts, is faulty by reason of announcing the old rule as a basis of decision. The parties to whom a draft, payable to order, had come by mesne indorsements, presented it to the drawee for payment, with the remark that it was the draft of C. M. the (drawer). In fact it was not the draft of C. M., whose signature had been forged. But the drawee paid it without detecting the forgery. Afterward, in a suit by the drawee against the presenter to recover back

<sup>13</sup> *Commercial & Farmers' National Bank v. First National Bank of Baltimore*, 30 Md. 11.

<sup>14</sup> *Dodge v. National Exchange Bank*, 20 Ohio St. 234.

the amount, the court said that there was no other representation as to the genuineness of the draft than a remark ordinarily made in course of business, and which did not amount to a warranty by the presenter, nor properly tend to throw the drawee off his guard. Every presenter of a draft says by implication, if not in direct terms, "Here is the draft of A. B., which I wish you to pay." All that is intended is that the draft bears the signature A. B., or purports to be the draft of A. B. The presenter does not mean, and is not understood to mean, to guarantee genuineness; he is not the party who is bound to know the signature, and reject it if forged; but the drawee is so bound, and must make the examination, and abide by his opinion and action consequent thereupon.<sup>15</sup>

§ 464. **The Old Rule Unreasonable.**—The old doctrine was that a bank was bound to know its correspondent's signature. A drawee could not recover money paid upon a forgery of the drawer's name, because, it was said, the drawee was negligent not to know the forgery, and it must bear the consequence of its negligence. This doctrine is fast fading into the misty past, where it belongs. It is almost dead, the funeral notices are ready, and no tears will be shed, for it was founded in misconception of the fundamental principles of law and common sense.<sup>9</sup>

(1) It is not enough to create legal liability, or to give A. a right to acquire or retain the property of B., to show merely that A. has been negligent; if so, property would be changing hands so rapidly that it could not be seen in transit, any more than the spokes of a bicycle. One more element is necessary, namely, that damage to A., being himself innocent in the matter, should naturally and proximately result from B.'s negligence.

This principle underlies the whole doctrine of negligence; as many times as there are cases in the books involving the question of liability for negligence, the necessity of both elements has been illustrated and enforced, except in the old forgery cases. They are strangely off the track, for in them it is held that the mere fact that B. was negligent gives A. a right to B.'s property, which A. did not have before the negligence (for no case affirms that the

<sup>15</sup> *Bernheimer v. Marshall*, 2 Minn. 78.

<sup>9</sup> § 464. *Bank of Lisbon v. Bank of Wyndmere*, 15 N. D. 299, 108 N. W. 546, 125 Am. St. Rep. 588, 10 L. R. A. (N. S.) 49, n. (1906); *American Express Company v. State National Bank*, 27 Okla. 824, 113 Pac. 711, 33 L. R. A. (N. S.) 188 (1911); *Canadian Bank of Commerce v. Bingham*, 30 Wash. 484, 71 Pac. 43, 60 L. R. A. (N. S.) 955 (1902).

holder of forged paper has any right to demand payment of it until it is accepted), without regard to the question whether A has sustained any loss by the negligence or not.

(2) The drawer or maker is himself sometimes deceived by a forgery of his own signature, and it is held that he may correct the mistake provided it can be done without putting an innocent holder of the paper in a worse position than he would have been if the drawer or maker had discovered the forgery upon presentation of the instrument.<sup>1</sup> Why should a bank be held to a stricter knowledge of the drawer's signature than the drawer himself?

The maker of a note paying innocently upon his own forged signature may sue the person who received it;<sup>2</sup> for money paid by mistake may be recovered, even though the payor was negligent,<sup>3</sup> unless his negligence has caused loss to an innocent party.

The old cases would not hold the drawer to any diligence in discovery of the forgery of his name; he was not bound even to examine his accounts, as men of ordinary prudence are in the habit of doing; and even if he told the bank that the signature was his, he could afterward prove the forgery unless the bank expressed suspicions at the time it asked his opinion, and brought to his attention the fact that it might lose remedies over by his mistake in the matter, and such loss actually followed. The bank was bound to know the drawer's signature, "because it must be presumed more familiar with it than the payee of holder", and it was "negligent in not making proper examination, which would have led to the discovery of the forgery"; therefore it was held to bear the loss. Now apply these reasons to the drawer, and it will be hard to see the consistency of releasing the drawer from all responsibility and putting the whole burden on the drawee, as the old cases did.

(3) If a bank receives forged bills purporting to be its own, it can, upon reasonably prompt discovery of the forgery, return them.<sup>4</sup> Is it harder for the bank to know its own paper than that of its

<sup>1</sup> *Woodruff v. Munroe*, 33 Md. 158; *Brooke v. Hook*, L. T. R. 24 Exch. 34.

<sup>2</sup> *Carpenter v. Northborough National Bank*, 123 Mass. 69; *Welch v. Goodwin*, 123 Mass. 71. There was fraud and misrepresentation in this case, but the court said this was not an essential element.

<sup>3</sup> *Lawrence v. American National Bank*, 54 N. Y. 435.

<sup>4</sup> *Gloucester Bank v. Salem Bank*, 17 Mass. 44. See *Young v. Adams*, 6 Mass. 182; *Eagle Bank v. Smith*, 5 Conn. 71.

depositors, and is it less negligent in receiving forgeries of its own name than in paying upon a forgery of some one out of a hundred or a thousand customers?

(4) If a bank certifies a check by mistake, and notifies the holder at once, before he has transferred it to a *bona fide* holder, or lost any rights upon it, the certification is revoked,<sup>5</sup> why does not the principle equally apply to payment?

(5) If a check is paid through the clearing-house, and the drawee discovers it has no funds, it may return the check even after the hour set by the clearing-house rules, if the payee bank has not lost its rights by the delay or altered its position,<sup>6</sup> though of course the drawee bank will be liable for damages caused by violating the rules. If such recovery be allowed in case of mistake as to sufficiency of funds, much more should it be allowed in case of forged paper. For it may very well be argued in case of any payment good except for want of funds, that it would save circuity of action to hold the drawee to the payment and give it no remedy except that against the drawer, instead of allowing it to sue the payee, and the payee be referred to the drawer; and if the drawer were solvent this might do, though it is clear that it would be unjust to hold the bank in this manner if the drawer had become insolvent, and the bank had given notice of its mistake in time to save the holder all his rights and remedies just as if payment had been refused.

But even this argument cannot be made in case of forgery; for (except in rare cases where the drawer acknowledges his signature or otherwise estops himself) the bank can have no right to charge the amount paid to the drawer.

### *When the Holder may Keep the Money*

(6) Every transferrer of a chattel warrants title, and the actual existence of what he transfers, and this rule applies as well to bank-bills, notes, checks, and coin as to the transfer of a horse. A counterfeit bill or forged check is nothing, the consideration of the contract fails utterly, as much as though a horse sold was a dead horse, the mere form of a horse. Payment or deposit of such nothings raises no debt, and any money paid upon account of the

<sup>5</sup> *Bank v. Baxter*, 31 Vt. 101; *Second National Bank v. West National Bank*, 51 Md. 128.

<sup>6</sup> *Merchants' National Bank v. National Eagle Bank*, 101 Mass. 281.

transfer of nothing is paid without consideration; the party receiving the money had no right to demand it, and has no right to retain after receiving it, no matter how negligent the payer may have been, and he cannot acquire any right to keep the money except upon the following combination of facts: 1st, that the payee was not negligent; 2d, that the payer was lacking in due care; 3d, that upon faith of the payer's action the payee has changed his position, or would be in a worse position if the mistake were corrected than if the payer had refused to pay or to accept at the time of presentment.

(7) It must be borne in mind that we have been considering only cases where the drawee was really acting under a mistake and the drawer had not so conducted himself as to become liable upon the paper; for if the drawee knew the signature was forged, or if the drawer is liable and the drawee may therefore rightly charge him with the payment, the money cannot be recovered.

§ 465. **Transition Cases. — Special Circumstances. —** *Distinction between discounting and paying for the acceptor.* — *Fuller v. Smith*<sup>1</sup> is a curious case. The plaintiffs, bankers, discounted for the defendants a bill purporting to be drawn by L. and accepted by N. The plaintiffs were N.'s bankers. The signatures of both L. and N. turned out to be forgeries. The plaintiffs were allowed to recover. A foot-note explains, what does not appear in the opinion, that the reason of this decision was that the plaintiffs did not *pay* the bill in their capacity as bankers for N., but only *discounted* it for the defendants in their general capacity as a banking-house. This distinction was considered to prevent this case from conflicting with *Smith v. Mercer*.<sup>2</sup>

*Unseen Draft paid on Representation. Money recovered*

In *Goddard v. Merchants' Bank*<sup>3</sup> the plaintiffs took up a forged draft for the honor of the supposed drawers, relying, in doing so, upon the statement made by the defendants' teller and notary that the defendants held a draft of the drawers named for collection, and that it had been dishonored. The plaintiffs did not at the time see the document, because it was locked up in the notary's

<sup>1</sup> § 465. *Fuller v. Smith, Ryan & Mo.* 49.

<sup>2</sup> 6 Taunt. 76.

<sup>3</sup> 4 N. Y. 147. And although the forgery was discovered too late to give notice of protest, no such notice was necessary, for the defendants had the bill only for collection, and needed no recourse, and the payee who forged the check was liable without notice.

safe and he was away, so that it could not be immediately got at. Instantly, when they did see it, they pronounced it a forgery. They were allowed to recover their payment, on the ground that it was induced by the incorrect assertion of the defendants' agents. But Ruggles, J., delivered a strong dissenting opinion, in which he asserted that none of the cases went the length of allowing the payors to recover where they had been guilty of substantial neglect, and in his opinion it was great neglect to pay an unseen draft under the circumstances shown. Certainly this view of the case is not incapable of strong support. If the plaintiffs were willing to waive the privilege of using their own judgment on the question of the genuineness of their customer's signature, and to accept the judgment of a notary or teller of another bank, it is at least such an excessive want of ordinary precaution that the law might reasonably refuse to help them out of the loss very naturally consequent thereupon.

§ 466. **Cases holding the Modern Doctrine.**—The point in issue has sometimes been said to be that of negligence.<sup>1</sup> The drawee who has paid upon the forged signature is held to bear the loss, because he has been negligent in failing to recognize that the handwriting is not that of his customer.<sup>1a</sup> But it follows obviously that if the payee, holder, or presenter of the forged paper has himself been in default, if he has himself been guilty of a negligence *prior* to that of the banker, or if by any act of his own he has at all *contributed* to induce the banker's negligence, then he may lose his right to cast the loss upon the banker.<sup>1b</sup> The courts have shown a steadily increasing disposition to extend the application of this rule over the new conditions of fact which from time to time arise, until it can now rarely happen that the holder, payee, or presenter can escape the imputation of having been in some degree contributory towards the mistake. Without any actual change in the abstract doctrines of the law, which are clear, just, and simple enough, the gradual but sure tendency and effect of the

<sup>1</sup> § 466. *Bank of Commerce v. Union Bank*, 3 Const. (N. Y.) 230.

<sup>1a</sup> And much more must the drawee bear the loss when the cashier pays the check knowing that the signature thereon was not that of the bank's customer. *National Bank v. First National Bank*, 141 Mo. App. 719, 125 S. W. 513 (1910).

<sup>1b</sup> *Canadian Bank of Commerce v. Bingham*, 30 Wash. 484, 71 Pac. 43, 60 L. R. A. 955 (1902). But knowledge of facts sufficient to put a purchaser on inquiry is not sufficient negligence to allow a recovery. *National Bank v. First National Bank*, 141 Mo. App. 719, 125 S. W. 513 (1910).

decisions have been to put as heavy a burden of responsibility upon the payee as upon the drawee, contrary to the original custom. The following cases will show that the interesting question has now come to be, whether or not the payee has done his full duty, or if he has, and the negligence is with the bank alone, whether the payee will be worse off by correcting the error than if payment had been refused.

*Correspondents of an Indorser Paying for his Honor*

(a) An early English case is that of *Wilkinson v. Johnson*.<sup>2</sup> The opinion, delivered in excellent shape by Chief Justice Abbott, puts this matter very clearly. A bill drawn on a London banking-house, bearing the names of several indorsers, was dishonored. The notary of the holders carried it to the London correspondents of one of the indorsers, and asked them to take it up for the honor of this indorser. They at once did so, and at the same time drew a pen through the subsequent indorsements. Shortly after, they discovered the whole paper to be a series of forgeries, and directly returned it to the holders, from whose notary they had received it. The whole took place within *business hours of one and the same day*. It was held that this case was to be distinguished from that of the failure of an acceptor or bank to recognize a customer's handwriting. The bankers, to whom the bill was presented by the notary, ought certainly to have known their correspondents' hand, and to have seen that their purported indorsement was a forgery. But it is not so much in the ordinary course of business to ask a correspondent to take up a bill for the honor of an indorser, as it is to present a bill to a drawee for acceptance, or, we may add, a check to a bank for payment. The very request implies the fact of the indorsement, and in a measure tends to induce less careful scrutiny. So, though both parties were in fault slightly, yet the fault of the notary *may* have led to, or contributed to, the fault of the bankers, who took up the bill at his request.

*Usage for Bank to Inquire as to Checks upon Another, and if it does not, it Cannot Retain the Money against the Drawee. Contributory Negligence of Holder*

(b) In a later case arising in Ohio, at the trial in the lower court at *nisi prius*, evidence was introduced going to show the existence

<sup>2</sup> 3 Barn. & Cr. 428.

of a custom in the city for the cashier or teller of a bank, to whom a check drawn upon another bank was presented and payment or purchase requested thereon by an unknown bearer, to take some means to assure himself that all was right; and for the drawee bank, upon receiving a check through another bank, to assume that such inquiries had been made by such other bank, and so to pay or give credit for the check with a proportionately less degree of scrutiny. The jury found for the drawee bank, and, upon exception, the verdict was sustained. The court *in banc* referred to the evidence of the custom, and said that, if the bank receiving the check should fail to comply with this custom, and to exercise such care, it would obviously contribute, by its own laches and negligence, to the error of the drawee bank in supposing the check to be genuine; and therefore, being itself not free from blame, having in fact given rise to, or at least promoted, the subsequent mistake, it must be held to bear the loss, and reimburse the drawee. The language of the court is, "Where the negligence reaches beyond the holder and necessarily affects the drawee, and consists of an omission to exercise some precaution, either by the agreement of parties or the course of business devolved upon the holder, in relation to the genuineness of the paper, he cannot, in negligent disregard of this duty, retain the money received upon a forged instrument."<sup>3</sup>

(c) To enable a holder to retain money paid to him on forged paper, he must put the bank alone in the negligence, and be able to say that the mistake of the bank "cannot now be corrected without placing the holder in a worse position than though payment had been refused. If he cannot say this, and especially if the failure to detect the forgery can be traced to his own disregard of duty in negligently omitting some precaution he had undertaken

<sup>3</sup> *Ellis & Norton v. Ohio Life Insurance & Trust Co.*, 4 Ohio St. 628; *Harmon v. Old Detroit National Bank*, 153 Mich. 73, 116 N. W. 617, 126 Am. St. Rep. 467, 17 L. R. A. (n. s.) 514, n. (1908). When both banks have been negligent there can be no recovery. *Bank of Williamson v. McDowell County Bank*, 66 W. Va. 545, 66 S. E. 761, 36 L. R. A. (n. s.) 605 (1910).

In Nebraska the drawee who has paid a draft to a holder for value can recover from the payee only by showing bad faith or negligence on his part. And it is not negligence or bad faith to purchase a foreign bill of exchange from a well-known payee without taking steps to ascertain whether the draft was genuine or would be paid. *State Bank of Chicago v. First National Bank*, 87 Neb. 351, 127 N. W. 244, 29 L. R. A. (n. s.) 100 n. (1910); *National Bank of Commerce v. Farmers' etc. Bank*, 87 Neb. 841, 128 N. W. 522 (1910).



to perform, he fails to establish a superior equity to the money, and cannot with good conscience retain it.”<sup>3</sup> If both parties are innocent equally, or both negligent equally, or the holder chiefly negligent, the bank may recover.

(d) But the Supreme Court of Massachusetts has recently gone to an unprecedented length in relieving the banks from the burden put upon them by the old rule, and in a large proportion of the cases where checks are made payable to order has practically shifted that *onus* to the shoulders of the payee. The case is as follows.<sup>4</sup> The firm of E. D. & G. W. B. & Co., the defendants, sold some gold over their counter to a person who gave them in return a check payable to their order, signed W. D. B., drawn on the plaintiff bank, bearing date on the day of the transaction. The check was indorsed “E. D. & G. W. B. & Co.”, and deposited by the payees that day in their bank for collection, and was on the following day passed through the clearing-house, and paid in ordinary course of business by the plaintiff bank. These transactions took place on September 21 and 22, 1869. On October 4, 1869, W. D. B., having received his checks from the bank in the monthly making up of his account, returned this check to the plaintiff bank and notified them that it was a forgery; and the bank on the same day notified the defendants. The court held that the plaintiffs were entitled to recover from the defendants the amount of the check, substantially upon the ground that the check, being payable to order, could not be given currency, or be put in shape for payment without the indorsement of the defendants; that by this indorsement the defendants had done an act tending to give the instrument the character of genuineness, and

<sup>4</sup> National Bank of North America v. Bangs, 106 Mass. 441.

The rule that a bank should know the signature of its customers is not available to one who represents to the bank that he holds in his hand the check of the customer, and who has not taken the precaution to ascertain the identity of the person with whom he was dealing. *Ford v. People's Bank*, 74 S. C. 180, 54 S. E. 204, 114 Am. St. Rep. 986, 10 L. R. A. (N. S.) 63, n. (1906); *Newberry Savings Bank v. Bank of Columbia*, 91 S. C. 294, 74 S. E. 615, 38 L. R. A. (N. S.) 1200 (1911); and one who takes a check in his own favor and himself presents it to the bank on which it is drawn represents to the bank that the signature is genuine, and if he is paid the amount of the check on such a representation and it turns out that the signature is not genuine and that he took no precaution to identify the person who signed it, the bank is not liable for failure to ascertain that such checks so presented are forgeries as it is lulled into confidence and repose by the presentation of the check as genuine. *Newberry Savings Bank v. Bank of Columbia*, *supra*.

to deter the plaintiff bank from making so careful an examination of the instrument on presentation as it might otherwise have done.

*If the Payee was Guilty of Contributory Negligence, or Indorsed the Paper, the Drawee can Recover*

The language of the opinion is substantially as follows. After explaining that the bank or drawee is presumed to have a special familiarity with the signature of the drawer and that from this presumption arises “*what is often called an obligation or responsibility*”, preventing the drawee from recovering back money paid on a forged signature, the court continues: “In the absence of actual fault or negligence on the part of the drawee, his constructive fault, in not knowing the signature of the drawer and detecting the forgery, will not preclude his recovery from one who has received the money with knowledge of the forgery, or who took the check, under circumstances of suspicion, without proper precautions, or whose conduct has been such as to mislead the drawee, or to induce him to pay the check without the usual scrutiny or other precautions against mistake or fraud. These exceptions are implied by the very terms in which the general rule is ordinarily stated. We are aware of no case in which the principle that the drawee is bound to know the signature of the drawer of a bill or check, which he undertakes to pay, has been held to be decisive in favor of a payee of a forged bill or check to which he has himself given credit by his indorsement.

“In the present case the check had not gone into circulation, and could not get into circulation until it was indorsed by the defendants. Their indorsement would certify to the public, that is, to every one who should take it, the genuineness of the drawer’s signature. Without it the check could not properly be paid by the plaintiff. Their indorsement tended to divert the plaintiff from inquiry and scrutiny, as it gave to the check the appearance of a genuine transaction. Their names upon the check were apparently inconsistent with any suspicion of a forgery of the drawer’s name.”

The defendants acknowledged that on October 4, when first notified of the forgery, they had wholly forgotten from whom they received the check, whether from a party known to them or not. The court said, that, by the mere fact of the presentation of such a check to them in payment, they were put upon their inquiry

as to its genuineness; that, having failed to satisfy themselves upon this point, they were not in a condition to put the loss upon the shoulders of another party. For all that appeared, they themselves had been guilty of the earlier laches.<sup>4a</sup>

In the above case, the mere fact that the defendants were unable to give the name of the person who presented the forged check was sufficient evidence of negligence.<sup>4b</sup>

In North Dakota the court has held that checks or drafts on

<sup>4a</sup> See also *Danvers Bank v. Salem Bank*, 151 Mass. 280, 24 N. E. 44, citing *National Bank of North America v. Bangs*, 106 Mass. 441; *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *Bank of Lisbon v. Bank of Wyndmere*, 15 N. D. 299, 108 N. W. 546, 125 Am. St. Rep. 588, 10 L. R. A. (N. S.) 49, n. (1906); *Ford v. People's Bank*, 74 S. C. 180, 54 S. E. 204, 114 Am. St. Rep. 986, 10 L. R. A. (N. S.) 63, n. (1906).

<sup>4b</sup> See *People's Bank v. Franklin Bank*, 88 Tenn. 303, 12 S. W. 716. But see *Farmers' etc. Bank v. Bank of Rutherford*, 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 817 (1905), which distinguishes and disapproves of *People's Bank v. Franklin Bank*, and holds that the drawee of a check is presumed to know the signature of its customer and that when it pays a forged check payable to a certain person or bearer and bearing a number of indorsements of other banks which had honored the check, and holds it for thirty days and could have detected the forgery if it had closely examined the signature, it has admitted the same to be correct and is estopped to deny the genuineness of the signature and cannot recover from a prior indorser the amount paid thereon. See *Farmers' National Bank v. Farmers' & Traders' Bank*, 159 Ky. 141, 166 S. W. 986, 1915A L. R. A. 77, n.; *Bank of Williamson v. McDowell County Bank*, 66 W. Va. 545, 66 S. E. 761, 36 L. R. A. (N. S.) 605 (1910); *Western Union Tel. Co. v. Bi-Metallic Bank*, 17 Colo. App. 229, 68 Pac. 115 (1902); *Canadian Bank v. Bingham*, 30 Wash. 484, 71 Pac. 43, 60 L. R. A. 955 (1902).

D. received as security for a loan, a check from a comparative stranger whose name or business he did not know, and without inquiry as to the purported maker of the check, the body of which was written by the same person who wrote the name of the payee on the back. The check was deposited for collection bearing the indorsement of the alleged payee, and of D. The bank guaranteed previous indorsements; receiving the check as the agent of D. for collection it was advised of the forgery several days before a certificate of deposit was forwarded to the alleged payee for the amount thereof. It was not shown that the certificate of deposit received from the collecting bank had ever been paid. D. had received the money from the alleged payee before the certificate of deposit was forwarded to him. In an action by the bank for money paid on the forged check the court approved of *National Bank v. Bangs*, and *Ellis & Morton v. Ohio Life Ins. Co.* *supra*, and held that, as by code the knowledge of the agent is the knowledge of the principal, D. must be deemed to have had notice of the forgery before forwarding the certificate of deposit, rendering him liable for its repayment; and that the bank receiving a check with previous indorsements guaranteed by the bank which transmits it for payment has a right to rely on the indorsements when it supposes the check is going through the regular channels and ordinary course of business. *Greenwald v. Ford*, 21 S. D. 28, 109 N. W. 516 (1906).

banks or individuals should not be governed by the same rules that apply to bank notes which circulate as money and the drawee who has paid a forged check may recover even when the payee has not been negligent provided he has not been misled or prejudiced by the drawee's failure to detect the error. The court say: "We therefore reject as unsound the doctrine that the drawee of a check should be excepted from the general rule in relation to the recovery of money paid by mistake. . . . But, as is usually the case when the party who has collected the check had previously cashed it or taken it in exchange for commodities there is no reason why he should not refund."<sup>4c</sup> And in Oklahoma where a payee receives money from a bank upon a check purporting to be drawn upon it by one of its depositors but whose signature was in fact forged, he is not entitled to retain the same except he can show that, (1) the payee was not negligent in receiving the check, (2) the payee was lacking in due care in paying the same, and (3) upon the payor's action the payee has changed his position or would be in a worse condition if the mistake was corrected than if the payor had refused to pay the check at the time of its presentment.<sup>4d</sup> But since the adoption of the negotiable instruments law if the drawee pays a forged check to a *bona fide* holder thereof, it cannot recover the money from the one to whom it was paid,<sup>4e</sup> and the guaranty of indorsement will not protect him.<sup>4f</sup>

(e) Unless the drawee's mistake as to signature of the drawer has caused the holder some loss, or the paper has been taken by a *bona fide* holder subsequently to acceptance by the drawee, the latter should not be held absolutely to a knowledge of his correspondent's signature.<sup>5</sup> The drawer himself may be deceived, and

<sup>4c</sup> *Bank of Lisbon v. Bank of Wyndmere*, 15 N. D. 299, 108 N. W. 546, 125 Am. St. Rep. 588, 10 L. R. A. (n. s.) 49, n. (1906).

<sup>4d</sup> *American Express Co. v. State National Bank*, 27 Okla. 824, 113 Pac. 711, 33 L. R. A. (n. s.) 188 (1911).

<sup>4e</sup> *Cherokee National Bank v. Union Trust Co.*, 33 Okla. 342, 125 Pac. 464 (1912); *National Bank v. First National Bank*, 141 Mo. App. 719, 125 S. W. 513 (1910); *National Bank v. Mechanics' American National Bank*, 148 Mo. App. 1, 127 S. W. 429 (1910); *Title Guarantee etc. Co. v. Haven No. 2*, 126 App. Div. 802 (1908). 111 N. Y. S. 305; *First National Bank v. Bank of Cottage Grove*, 59 Or. 388, 117 Pac. 293 (1911) stating that the weight of judicial authority holds the same.

<sup>4f</sup> *Cherokee National Bank v. Union Trust Co.*, 33 Okla. 342, 125 Pac. 464 (1912); *National Bank v. First National Bank*, 141 Mo. App. 719, 125 S. W. 513 (1910).

<sup>5</sup> *McKleroy v. Southern Bank of Kentucky*, 14 La. Ann. 458; *Chitty on Bills*, 485; *First National Bank v. First National Bank*, 4 Ind. App. 355,

is not held unless loss has occurred by his mistake, or a *bona fide* holder has taken the paper on faith of his action.

*Holder's Neglect to Impart Suspicious Facts*

(f) The holder of a check (C.) signed by A. had formerly received a check signed by the same party but with a different name. He did not mention this fact to the bank on presenting check C. and was held to repay the money in consequence of his neglect to impart this knowledge of suspicious circumstances, C. turning out to be a forgery.<sup>6</sup>

*Holder Bank Negligent in Not Requiring Identification*

(g) A certificate of deposit issued by bank A. to D., who could not write, was brought to bank B. by E., who gave D.'s name and said he could not write. His mark was taken with all due solemnity and witnessing, and the certificate forwarded to bank A., which paid it, and E. got the money. D. soon after presented himself at A. and demanded his cash; upon this discovery, A. paid D. and sued B. *Held*, A. could recover, as it had a right to rely on B.'s identification of the person to whom it paid the money.<sup>7</sup>

(h) In 1849 a statute was enacted in Pennsylvania under which the drawee bank may recover from the holders money paid upon forged checks.<sup>8</sup> Mere "want of care or negligence in paying a forged bill will not alone, since this act, preclude recovery."<sup>9</sup> As between the bank and the person receiving the money, the bank is not bound to know its depositor's signature as formerly. But if the bank is negligent, and the holder has innocently, before notice of the forgery, changed his condition on faith of the bank's action, the bank cannot recover; the statute was not intended to relieve the bank of the consequences of its own neglect.<sup>10</sup> But

30 N. E. 808. See *Canadian Bank v. Bingham*, 46 Wash. 657, 91 Pac. 185 (1907).

<sup>6</sup> *Rouvant v. San Antonio National Bank*, 63 Tex. 610.

<sup>7</sup> *State National Bank v. Freedmen's Savings & Trust Co.*, 2 Dill. (U. S.) 11. See *Newberry Savings Bank v. Bank of Columbia*, 91 S. C. 294, 74 S. E. 615, 38 L. R. A. (n. s.) 1200 (1911).

<sup>8</sup> *Corn Exchange National Bank v. National Bank of the Republic*, 78 Pa. St. 233; *Tradesmen's National Bank v. Third National Bank*, 66 Pa. St. 435; both payments through the clearing-house.

<sup>9</sup> *Union National Bank v. Chambers*, 9 Phila. 131.

<sup>10</sup> *Corn Exchange National Bank v. National Bank of Republic*, 9 Phila. 133.

the right of the bank to recover does not depend on the question whether the holder can recover of the forger.<sup>8</sup>

In another Pennsylvania case a draft to the order of the drawers came to the hands of bank B., which received the money from the drawee through the clearing-house. Two days after, the forgery was discovered, and the drawee bank by suit recovered.<sup>11</sup> The rule of the clearing-house, that errors should be adjusted and checks not good returned before one o'clock, was held to apply only to ascertaining that the account was overdrawn.<sup>12</sup>

In *United States v. National Exchange Bank*,<sup>13</sup> it is held that where a bank pays a check on a forged indorsement it is not responsible therefor to the drawer, where the person who committed the forgery was identified to the bank by one who believed him to be the payee, and was in fact the person to whom the drawer had delivered the check, and whom he also believed to be the payee.

In apparent conflict with the foregoing case is *Chism, Churchill & Co. v. Bank*,<sup>14</sup> which holds that where the payee of a draft indorses it to a fictitious person, as the result of a fraud, and the drawee, relying on a forged indorsement in the name of such fictitious person, pays the draft, the drawee is not thereby relieved from liability to the payee.

#### **Between Bank and Drawer, Forgery of Drawer's Signature**

§ 467. **The Old Rule.** — The effort has been made to have the writing up of the customer's bank-book, and returning it to him together with the checks, purporting to be vouchers, held to be equivalent to the rendition of an account stated, which, if not promptly rejected by the depositor as incorrect, is to be held binding upon him, so that he cannot afterward demand correction if a forged or altered check has been wrongly charged to him. Formerly the courts did not accept the doctrine, but declared that the depositor was under no obligation to examine the checks returned to him, and purporting to have been drawn by him; and that he was not concluded by his neglect to do so, and his consequent failure promptly to detect a false check.<sup>1</sup>

In criminal law it has been held that altering one's own signature

<sup>11</sup> *Levy v. Bank*, 1 Binn. (Pa.) 27.

<sup>12</sup> *Tradesmen's National Bank v. Third National Bank*, 66 Pa. St. 435.

<sup>13</sup> 45 Fed. 163.

<sup>14</sup> 96 Tenn. 641, 36 S. W. 387.

<sup>1</sup> § 467. *Weisser v. Denison*, 10 N. Y. 68; *Manufacturers' National Bank v. Barnes*, 65 Ill. 69.

to a paid check, and then insisting that it is a forgery, and demanding reimbursement from the bank, though a fraud on the bank, is not forgery.<sup>2</sup>

§ 468. **When Drawer pronounces his Signature Good, or issues the Paper with a Forgery upon it.** — A signature that one has himself sent into the world he cannot deny,<sup>3</sup> as, if a forged signature is on a note at the time the maker issues it, the holder may recover of him.

So, if the drawee accepts a bill or check, the acceptance is a warranty of the genuineness of the paper up to the time of acceptance as to any *bona fide* holder taking after the acceptance; but not as to the party presenting the paper to the drawee, for such person had it already, and did not take it on the faith of the acceptance. Any person who pronounces his own signature to be good will be estopped to deny it as against one who has *bona fide* acted on the faith of his representation; as against one who buys<sup>1</sup> upon his assurance, or delays to enforce his rights at his request, thus allowing other parties to abscond or fail.<sup>2</sup> But if the mistake is discovered, and notice given before the holder is any the worse for it, it may be corrected.<sup>3</sup>

If the drawer knew, when he acknowledged the signature, that it was forged, his action will be held an adoption of it, and he will be bound as if he had signed actually.<sup>4</sup> Actual fraud or *mala fides* in the adverse party will prevent such adoption;<sup>5</sup> and if the party did not know the facts affecting his rights, he is not bound by the acknowledgment.<sup>6</sup> Paying similar former drafts knowing

<sup>2</sup> *Brittain v. Bank of London*, 3 F. & F. 465; 11 W. R. 569.

<sup>3</sup> § 468. The signature upon which a depositor is to be bound and the bank is authorized to disburse his money may be whatever is agreed upon, and where the signature book reads "John Doe, per R. R." in the handwriting of Richard Roe that is the signature and the writing which the bank should expect. *Polizzotto v. People's Bank*, 125 La. 770, 51 So. 843, 30 L. R. A. (N. S.) 206, n. (1910).

When one's signature is signed by another by one's consent or authority one is bound thereby. *Phoenix National Bank v. Taylor*, 113 Ky. 61, 67 S. W. 27 (1902).

<sup>1</sup> *Woodruff v. Munroe*, 33 Md. 158; *Greenfield Bank v. Crafts*, 4 Allen (Mass.) 447; *Beeman v. Duck*, 11 Mees. & W. 251; *Dow v. Spenny*, 29 Mo. 390.

<sup>2</sup> *Hefner v. Dawson*, 63 Ill. 403.

<sup>3</sup> *Woodruff v. Munroe*, 33 Md. 158.

<sup>4</sup> *Hefner v. Vandolah*, 62 Ill. 483; *Wellinton v. Jackson*, 121 Mass. 157; *Union Bank v. Middlebrook*, 33 Conn. 100.

<sup>5</sup> *McHugh v. County of Schuylkill*, 67 Pa. St. 391.

<sup>6</sup> *Gleason v. Henry*, 71 Ill. 109.

they were forgeries may estop the acceptor, whose name is forged, from denying his liability on a subsequent bill, as having adopted such acceptances.<sup>7</sup> So, if an acceptor knows that an indorsement is forged when he negotiates the paper, he is bound.<sup>8</sup>

*Drawer, although Acknowledging His Signature, may Recover, unless the Bank is Injured by His Negligence*

It will sometimes happen that a bank, after it has made actual payment upon a check, will have some suspicion arise as to the genuineness of the drawer's signature, and will show him the check and ask him if it be good. In such case, if the drawer, in good faith and under the mistaken impression that the signature is in fact his own, answers that it is his, when in fact it is not, he is not concluded by his answer from afterwards showing that the signature is in fact a forgery. Odd as such cases may seem, they are not by any means of rare occurrence in the course of business. Imperfect sight, distracted attention, a very excellent simulation of the handwriting, have not infrequently led to false statements in this respect. The cases are unanimous in declaring that the depositor is not estopped by his assertion.<sup>9</sup> The ground is, that he does no act which affects the position of the bank. The *deed of the bank* is perfect. *Its legal effects have all accrued.* The depositor volunteering to try to answer honestly a question which concerns only such a completed transaction, is under no liability for a mistake. His answer is a gratuitous courtesy, rather than a legal admission. Concerning a matter not directly interesting to himself, he means to give as correct information as he can. But he by no means seeks to give currency or credit to the check, which is indeed now no longer a check, but a mere piece of documentary evidence.

*Drawer Estopped*

This is the general rule. Exceptional cases may, of course, arise, which would be taken out of its operation. Thus, if the bank should intimate its suspicions, and say that if the check were not good, and that by being promptly assured of the fact

<sup>7</sup> Barber v. Gingell, 3 Esp. 60; Crout v. De Wolf, 1 R. I. 393.

<sup>8</sup> Beeman v. Duck, 11 Mees. & W. 251.

<sup>9</sup> Weissner v. Denison, 6 Seld. (N. Y.) 68; Hall v. Huse, 10 Mass. 40 (a case of a promissory note); Salem Bank v. Gloucester Bank, 17 id., 1 (a case of bank bills); Barber v. Gingell, 3 Esp. 60; Pickard v. Sears, 6 Ad. & El. 469; Leach v. Buchanan, 4 Esp. 226.



it might be able to save itself in whole or in part from loss, then the drawer might well be held to make a thorough scrutiny of the signature, and be thereafter estopped by his acknowledgment of it as his own; especially if in real fact that acknowledgment caused the bank to abandon substantial means of saving itself harmless. But in such a case it would be essential that the bank should state to the supposed drawer at the time its doubts, and its hopes of saving itself. For even if these existed, and the bank did not mention them, but to all appearance merely asked a question of curiosity or ordinary interest, the drawer would not be put under the especial and peculiar obligation which full information would lay upon him.

§ 469. **Drawer in Fault.** — F. had a book-keeper, K., who forged F.'s check for \$2500. As it exceeded F.'s deposit, the bank notified him and showed him the check; he said he had not signed it, but did not say it was a forgery, and, after seeing K., told the bank it was all right. Subsequently K. forged F.'s name for \$1700, and the bank paid it. *Held*, that F. had caused his own loss by ratifying K.'s former wrong, and retaining him in his service.<sup>1</sup>

It is the duty of a customer to take reasonable care not to mislead the bank, but beyond the care necessary in the transaction itself the customer has no duty to take precautions to prevent his servant from forging his signature.<sup>2</sup>

§ 470. **Drawer's Negligence in leaving Check-book accessible does not relieve the Bank.** — A bank is not relieved from liability to the drawer for paying on a forgery of his name by showing that it was committed on a blank taken from the depositor's check-book that was left lying about the office; that the clerk was allowed to fill up checks, and introduced to the bank officials as a proper person to receive money on the depositor's check. In the absence of proof that the clerk had or was properly supposed by the bank to have authority to sign the depositor's name, the bank is liable for the payment.<sup>1</sup> See § 480.

§ 470 A. **Unauthorized Use of Rubber Stamp.** — The mere fact that a depositor had, without knowledge of his bank, a rubber stamp, which was a substantial facsimile of his bank signature,

<sup>1</sup> § 469. *De Feriet v. Bank of America*, 23 La. Ann. 310.

<sup>2</sup> *Kepitigalla Rubber Estate v. National Bank of India*, (1909) 2 K. B. 1010.

<sup>1</sup> § 470. *Mackintosh v. Eliot National Bank*, 123 Mass. 393.

does not, irrespective of the depositor's negligence, relieve the bank from loss which occurs by reason of the unauthorized signing of a check with such stamp by a third person.<sup>1</sup>

§ 471. **Ratification by Drawer's Conduct.** — A. gave B. money to deposit, which B. did in his own name, the bank knowing, however, who owned the fund. B. indorsed the certificate of deposit to A., but afterward abstracted it, crossed out the indorsement, and got the money. A. objected to B. and to the bank, but B. promised to give A. a mortgage as security, and on this promise A. let the matter run on for three years, treating the transaction as a loan to B. *Held* that A. could not recover of the bank after such treatment of the matter.<sup>1</sup>

Where notes purporting to have been made by H., payable to A. and J. and discounted by A. at various banks and paid by H. and J. though claimed to have been forged by A., they knowing that other notes were made and indorsed in like manner in their names, and they failed to warn such banks of the forgery and against discounting such other notes, they will not be allowed to plead against such banks that the other notes were forgeries.<sup>1a</sup>

When an agent deposits to his principal's credit money arising from a claim mentioned in a power of attorney, giving him general power to collect, give receipts, apply, do generally, etc., and the agent draws the money on checks purporting to be signed by the principal and believed by the officers of the bank to be genuine, the bank is discharged, the checks are acquittances, though forged.

In this case the court said that, aside from any question of authority, ratification, or knowledge, money paid by the bank to the agent, which he delivered to his principal, or retained with her consent, or disposed of with her approval, would be a credit to the bank on the deposit account, unless thus to follow the fund would violate some peculiar equity.<sup>2</sup>

If the money paid on the forged check was deposited in a bank to the credit of the owner who afterwards accepted the proceeds and drew his check against the same there is a ratification of all that has preceded.<sup>3</sup>

<sup>1</sup> § 470 A. *Robb v. Pennsylvania Co.*, 186 Pa. St. 456, 40 Atl. 969.

<sup>1</sup> § 471. *Dewar v. Bank*, 115 Ill. 22, 3 N. E. 746.

<sup>1a</sup> *Parkersburg National Bank v. Hannaman*, 63 W. Va. 358, 60 S. E. 242 (1908).

<sup>2</sup> *City Bank of Macon v. Kent*, 57 Ga. 283 (1886).

<sup>3</sup> *Phoenix National Bank v. Taylor*, 113 Ky. 61, 67 S. W. 27 (1902).

✓ § 472. **The Drawer must exercise Ordinary Diligence in Examination of Accounts and Vouchers.**—Where a depositor acquiesced in an account stated by silence for two years thereafter, and then sued the bank on the claim that some of the checks paid as his had been signed without authority, *held* that the burden was on him to impeach the checks.<sup>1</sup>

A depositor who knows checks paid by the bank and charged to him are forged, and fails to give notice to the bank, will be estopped. "If a party having an interest to prevent an act being done has full notice of its being done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license."<sup>2</sup>

In *Morgan's case*<sup>3</sup> the United States Supreme Court said that

<sup>1</sup> § 472. *American National Bank of Detroit v. Bushey*, 45 Mich. 135, 7 N. W. 725 (1880); *Myers v. Southwestern National Bank*, 193 Pa. St. 1, 44 Atl. 280; *First National Bank v. Allen*, 100 Ala. 476, 14 So. 335; *Weinstein v. Bank*, 69 Tex. 38, 6 S. W. 171, citing *Schwarz v. National Bank*, 67 Tex. 217, 2 S. W. 865; *The Atlanta National Bank v. Burke*, 81 Ga. 600, 7 S. E. 738; *Janin v. Bank*, 92 Cal. 14, 27 Pac. 1100; *Wind v. Fifth National Bank*, 39 Mo. App. 72; *Kenneth Investment Company v. National Bank*, 96 Mo. App. 125, 70 S. W. 173 (1902).

<sup>2</sup> *Carneross v. Lorimer*, 3 Macq. 830. See *McNeely Company v. Bank of North America*, 221 Pa. St. 588, 70 Atl. 891, 202 R. A. (N. S.) 79, n. (1908) where there was a failure to notify for about three months after there was knowledge that about ninety checks had been forged. And it is immaterial whether the bank has lost rights against other parties. In the case last cited the court said that whenever a depositor knowingly withholds from a bank knowledge without which it cannot proceed in an effort to protect itself, he ought to be regarded, when he comes to enforcing alleged rights against it, as having withheld from it a substantial right without regard to what might or might not have resulted from a prompt exercise of that right.

When the body of the check is in a strange handwriting it is sufficient to excite the suspicion of the drawer and require him to notify the bank and if he fails to do so, he cannot recover the amount of forged checks paid thereafter. *Israel v. State National Bank*, 124 La. 855, 50 So. 783 (1909).

Some states are strongly opposed to the doctrine of estoppel in regard to checks paid before knowledge of the forgery, and hold that the liability of the depositor for neglect of his duty to examine and verify his accounts with the bank is limited to the damages sustained by the bank in consequence of such neglect. *Critten v. Chemical National Bank*, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529 (1902); *National Dredging Co. v. Farmers' Bank*, 6 Penn. (Del.) 580, 69 Atl. 607, 13 Am. St. Rep. 158, 16 L. R. A. (N. S.) 593 (1908); *First National Bank v. Allen*, 100 Ala. 476, 14 So. 335, 46 Am. St. Rep. 80, 27 L. R. A. 426, n.

<sup>3</sup> *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96, 29 L. ed., 811,

not only would the law estop the depositor if he had actually discovered that checks charged to him were forgeries, and failed to notify the bank; but if the depositor was guilty of neglect in failing to make such reasonably careful and prudent examination as would lead to the discovery, he must bear the loss. And if the agent he appoints is negligent, it is imputable to him.<sup>3a</sup>

*"Of course, if the defendant's officers, before paying the altered checks, could by proper care and skill have detected the forgeries, then it cannot receive a credit for the amount of those checks, even if the depositor omitted all examination of his account. But if by such care and skill they could not have discovered the forgeries, then the only person unconnected with the forgeries who had the means of detecting them was Cooper himself. He admits that by such an examination as that of March, 1881 (when, Berlin having stayed away from the office for a day, he compared his pass-book with the stubs of the check-book, and ascertained that a certain number of checks appearing on the stubs were not charged against him in his pass-book, and did not appear to have been returned by the bank, while others, which appeared on the pass-book to have been charged against and returned to him, did not appear, by*

6 Sup. Ct. 657. See *Morgan v. U. S. Mortgage & Tr. Co.*, 208 N. Y. 218, 201 N. E. 871, 1914 D. Ann. Cas. 463, n.; *Critten v. Chemical National Bank*, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529 (1902); *North British etc. Ins. Co. v. Merchants' National Bank*, 161 App. Div. 341 (1914), 146 N. Y. S. 720; *National Dredging Company v. Farmers' Bank*, 6 Penn. (Del.) 580, 69 Atl. 607, 130 Am. St. Rep. 158, 16 L. R. A. (n. s.) 593 (1908); *New York Produce Exchange Bank v. Houston*, 169 Fed. 785 (1909); *United States v. National Bank of Commerce*, 205 Fed. 433 (1913); *Kenneth Investment Company v. National Bank*, 103 Mo. App. 613, 77 S. W. 1002 (1903); *Morgan v. United States Mortgage Co.*, 125 App. Div. 22 (1908), 109 N. Y. S. 274; *Grand Lodge v. State Bank*, 92 Kan. 876, 142 Pac. 1002 (1914) (the lodge may rely on report of its auditing committee).

<sup>3a</sup> *Myers v. Southwestern National Bank*, 193 Pa. St. 1, 44 Atl. 280; *First National Bank v. Allen*, 100 Ala. 476, 14 So. 335; See *First National Bank v. Richmond Electric Co.*, 106 Va. 347, 56 S. E. 152, 117 Am. St. Rep. 1014, 7 L. R. A. (n. s.) 744, n. (1907) (agent forged the checks); *Critten v. Chemical National Bank*, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529 (1902) (clerk made the alterations); *National Dredging Co. v. Farmers' Bank*, 6 Penn. (Del.) 580, 69 Atl. 607, 130 Am. St. Rep. 158, 16 L. R. A. (n. s.) 593 (1908) (clerk's knowledge of the forgery resulting from himself committing the forgery is not to be attributed to the company); *United States v. National Bank of Commerce*, 205 Fed. 433 (1913) (fraud of agent is not imputable to the principal); *National Bank of Commerce v. Tacoma Mills Company*, 182 Fed. 1 (1910); *Kepitigalla Rubber Estate v. National Bank of India*, (1909) 2 K. B. 1010; *Kenneth Investment Company v. National Bank*, 96 Mo. App. 125, 70 S. W. 173 (1902).

the stub of the check-book, to have ever been drawn), he could easily have discovered them on the balancings of October 7th, 1880, November 19th, 1880, and January 18th, 1881. If he had discovered that altered checks were embraced in the account, and failed to give due notice thereof to the bank, it could not be doubted that he would have been estopped to dispute the genuineness of the checks in the form in which they were paid.

“It seems to us, that if the case had been submitted to the jury, and they had found such negligence upon the part of the depositor as precluded him from disputing the correctness of the account rendered by the bank, the verdict would not have been set aside as wholly unsupported by the evidence. In their relations with depositors, banks are held, as they ought to be, to rigid responsibility. But the principles governing those relations ought not to be so extended as to invite or *encourage such negligence by the depositors in the examination of their bank accounts as is inconsistent with the relations of the parties, or with those established rules and usages sanctioned by business men of ordinary prudence and sagacity, which are or ought to be known to depositors.*

“We must not be understood as holding that the examination by the depositor of his account must be so close and thorough as to exclude the possibility of any error whatever being overlooked by him. Nor do we mean to hold that *the depositor is wanting in proper care when he imposes upon some competent person the duty of making that examination, and of giving timely notice to the bank of objections to the account. If the examination is made by such an agent or clerk in good faith, and with ordinary diligence, and due notice given of any error in the account, the depositor discharges his duty to the bank. But where, as in this case, the agent commits the forgeries which misled the bank and injured the depositor, and therefore has an interest in concealing the facts, the principal occupies no better position than he would have done had no one been designated by him to make the required examination, — without at least showing that he exercised reasonable diligence in supervising the conduct of the agent while the latter was discharging the trust committed to him.* In the absence of such supervision, the mere designation of an agent to discharge a duty resting primarily upon the principal cannot be deemed the equivalent of performance by the latter. While no rule can be laid down that will cover every transaction between a bank and its depositor, it is sufficient to say that the latter's duty is discharged when he exercises such diligence as is

required by the circumstances of the particular case, including the relations of the parties, and the established or known usages of banking business.”<sup>35</sup>

In the case of *Hardy v. Chesapeake Bank*,<sup>4</sup> fourteen checks were forged by Holmes, the confidential clerk of Hardy. It was the business of this clerk to keep Hardy's books, “to enter the checks in the bank-book, and to superintend the writing up and balancing the account with the bank, and to keep himself informed of the true state of the accounts.” Five of the checks were returned to Hardy with the balance of July, 1873, the rest with that of October 6. Hardy discovered the forgery on October 10, and notified the bank. In a suit by him against the bank, the jury returned a verdict for Hardy for the first five checks only. He appealed, and the court held that the principle was universally maintained, that the bank was bound to know the signature of the drawer. No title could pass by a forgery, and of itself the possession of forged paper paid by it gave the bank no claim against the person whose name was forged. But if Hardy knew the forgeries had been committed, or if he was negligent after the balance of July, and carelessly omitted to use means of information easily accessible that would have led to discovery, if, in other words, he would have been led to a knowledge of the facts by such diligence as men of ordinary prudence exercise in similar matters, then it must be found that the bank was misled into paying the nine later checks by Hardy's neglect, and he would be estopped as against the bank to deny Holmes's authority to draw them. The court lay great stress on the doctrine of estoppel, saying, however, that it “can have no application except the party invoking it can show that he has been induced to act or refrain from acting by the acts or conduct of the adverse party under circumstances that would naturally and rationally influence ordinary men. . . . Negligence, to create an estoppel, must be in the transaction itself and be the proximate cause of leading the third party into mistake, and also must be the neglect of some duty which is owing to such third party, or to the general public. . . . We think it not too much to say, that in a case like the present there is a duty owing from the customer to the bank to act with that ordinary diligence and care that prudent business men generally bestow in such cases, in the examination and comparison of the debts and credits con-

<sup>35</sup> See *National Bank v. Tacoma Mills*, 182 Fed. 1 (1910).

<sup>4</sup> 51 Md. 585.

tained in his bank or pass book in order to detect any errors or mistakes therein."

After a reasonable time, the presumption arises that an account rendered is correct. This results from the habit of business men to examine and scrutinize such accounts. But if the error is not discoverable by reasonable care,<sup>4a</sup> or there is no such appearance of things as to excite suspicion in a reasonable man, or if, for any reason, the party had no opportunity to examine the account by himself or by his agent, the presumption is repelled.

The knowledge of the agent of his own wrong was not the knowledge of the principal.<sup>4b</sup> The agent's knowledge is only imputed to the principal when the former is acting in the course of his employment.<sup>4c</sup> Otherwise the grossest injustice might be done in the name of the law, and an innocent person held responsible for all sorts of felonies,<sup>5</sup> and even his own murder might become a suicide.

In Massachusetts this case arose. A check payable to order was fraudulently altered by the drawer's clerk, after having been signed by the drawer, by erasure of the payee's name, and was thereby made payable to bearer, and the amount was collected by the clerk from the bank. The bank on the first day of the following month wrote up the depositor's bank-book, and returned it to him with this check among the others. Another monthly writing up occurred, and then the depositor drew out the balance shown to be due to him. The checks were examined by the clerk, not by the depositor himself; no objection was suggested concerning this altered check. Twenty-three months afterward, the

<sup>4a</sup> As where the drawer did not know the signature of the payee. *Pratt v. Union National Bank*, 79 N. J. L. 117, 75 Atl. 313 (1909); *Murphy v. Metropolitan National Bank*, 191 Mass. 159, 77 N. E. 693, 114 Am. St. Rep. 595 (1906).

<sup>4b</sup> Where the claim of negligence of the depositor is based upon previous forgeries of his agent the knowledge of the depositor or notice to him of the former misconduct of the depositor must be shown in order to charge the depositor with negligence in intrusting the check to the agent for delivery and payment. *Grand Lodge v. State Bank*, 92 Kan. 876, 142 Pac. 974 (1914).

<sup>4c</sup> The forgery of the indorsement of the payee of a bank check is not in the course of employment of the agent to whom the check is intrusted only for delivery to the payee. *Grand Lodge v. State Bank*, 92 Kan. 876, 142 Pac. 974 (1914).

<sup>5</sup> See *Hardy's case*, p. 784, and *Welsh v. German American Bank*, 73 N. Y. 424; *Weisser v. Denison*, 10 N. Y. 77; *Star Fire Ins. Co. v. New Hampshire National Bank*, 60 N. H. 442; *Clark v. National Shoe and Leather Bank*, 32 App. Div. (Hun, N. Y.) 316.

drawer, discovering the facts, sued the bank for the amount of the check. It was held that he was bound to use due diligence in discovering the alteration; also that he was affected by the knowledge of his agent, the clerk, to whom he entrusted the duty of examining the returned checks; also, as bearing on the question of ratification, that evidence that the bank had previously paid checks of this drawer, bearing evidence on their face of alterations in the name of the payee, was inadmissible.<sup>6</sup> A ruling, requested by the bank, was refused, to the effect that, if the depositor did not, after a reasonable opportunity for doing so, examine the checks which were returned to him as paid, and object to the payment of this altered one, he must be presumed to have ratified it.

*Depositor Held to Due Diligence in Discovering Forgery, and is Responsible for his Agent's Negligence, to whom he Intrusts the Examination*

The court said that the question of ratification was for the jury. Whether the circumstances known to the plaintiff called for an examination that would have led to discovery of the forgery was a question for the jury. "The plaintiffs owed to the defendant the duty of exercising due diligence to give it information that the payment was unauthorized; and this included, not only due diligence in giving notice after knowledge of the forgery, but also due diligence in discovering it. If the plaintiffs knew of the mistake, or if they had that notice of it which consists in the knowledge of facts which, by the exercise of due care and diligence will disclose it, they failed in their duty; and adoption of the check and ratification of the payment will be implied. They cannot now require the defendant to correct a mistake to its injury, from which it might have protected itself but for the negligence of the plaintiffs. Whether the plaintiffs were required in the exercise of due diligence to read the monthly statements or to examine the checks, and how careful an examination they were bound to make, and what inferences are to be drawn, depend upon the nature and course of dealing between the parties, and the particular circumstances under which

<sup>6</sup> *Dana v. National Bank of the Republic*, 132 Mass. 156. See also *National Dredging Co. v. Farmers' Bank*, 6 Penn. (Del.) 580, 69 Atl. 607, 130 Am. St. Rep. 158, 16 L. R. A. (N. S.) 593 (1908) where the pass book had been written up and settlements made and the balance in the pass book ascertained twelve times during the period of five and one half years before the forgery was discovered.



the statements and checks were delivered to them. There was evidence that the plaintiffs did examine the statements and checks so far as to see that the checks returned corresponded with the amounts in the stub of the check-book. Whether this was all the examination required we need not consider. The plaintiffs made that examination, and are affected with the knowledge it would give, though it was made by Piper. He was their agent for that purpose. . . .<sup>6a</sup>

"If the examination made by Piper as agent for the plaintiffs, and the information which came to him within the scope of his agency, were sufficient to have given him notice of the forgery of the check of November 20, it does not lie in the mouth of the plaintiffs to say that he did not acquire that knowledge as their agent, so as to affect them with it. If such examination would have given them notice if made by an honest agent, they cannot affect ignorance because they were made by a dishonest agent, who had fraudulent knowledge of the fact."

§ 473. **Mere receipt of the Account, and Silence, does not conclude the Drawer. — Immediate Examination is not necessary, he is held only to Ordinary Diligence.** — The depositor is entitled to assume that his check, payable to order, will not be paid by the bank until it shall have assured itself that the necessary indorsements appearing thereon are genuine.<sup>1</sup>

Welsh's book-keeper had charge of his bank-books and of his produce. He made fictitious accounts of purchases, and got Welsh to sign checks for payment of the price, payable to the order of the customer from whom the alleged purchases were made. The book-keeper forged the customer's indorsement and got the money. Welsh did not discover the fraud for some months, but gave prompt notice when he did. It was held that neither the deception upon him, nor his receiving the bank-books and checks as vouchers, precluded him from recovering of the bank.<sup>1</sup>

The person whose name is forged is not obliged to examine

<sup>6a</sup> Even though he had previously committed the forgery. *First National Bank v. Richmond Electric Co.*, 106 Va. 347, 56 S. E. 152, 117 Am. St. Rep. 1014, 7 L. R. A. (N. S.) 744, n. (1907).

<sup>1</sup> § 473. *Welsh v. German American Bank*, 73 N. Y. 424; *United Security Life Insurance and Trust Co. v. Central National Bank*, 185 Pa. St. 586, 40 Atl. 97; *Pollard v. Wellford*, 99 Tenn. 113, 42 S. W. 23; *Lieber v. Fourth National Bank*, 137 Mo. App. 158, 117 S. W. 672 (1909).

immediately to detect the forgery, it is sufficient if he notifies the bank when he discovers the forgery.<sup>2</sup>

The duty of the drawer is only to exercise ordinary care in examining his accounts,<sup>2a</sup> he is not required to carry on the examination in such a manner as necessarily to lead to discovery. If he examines the checks himself and is deceived, or if he has an agent who *bona fide* conducts a reasonably careful examination, and the skilfulness of the forger eludes detection by ordinary care, the loss cannot be shifted upon the drawer.<sup>3</sup>

A customer and depositor of a bank is not presumed to know the signature of his payee, and if it does not appear, that he did in fact know the signature, he is not guilty of negligence in not discovering the forgery.<sup>4</sup>

§ 474. **The Bank paying on Forged Indorsement is liable to the true Owner.** — If A. draws a check payable to B. and delivers it to B., and C. forges B.'s name and gets the money, B. can recover

<sup>2</sup> First National Bank *v.* Tappan, 6 Kan. 456. But see Kenneth Investment Co. *v.* National Bank, 103 Mo. App. 613, 77 S. W. 1002 (1903), holding that ten days is a reasonable time to make an examination when the bank and the depositor reside in the same town or city.

In the absence of negligence on the part of the bank the failure of the depositor to notify the bank within a reasonable time that such checks have been forged or fraudulently altered, will, if the delay is caused by his negligence in examining the pass book and vouchers, or in giving notice if he had discovered the forgeries, constitute a defence by the bank to a depositor's suit for money subsequently paid out on similar checks. National Dredging Co. *v.* Farmers' Bank, 6 Penn. (Del.) 580, 69 Atl. 607, 13 Am. St. Rep. 158, 16 L. R. A. (N. S.) 593 (1908). If the forgery is discovered it is the depositor's duty to promptly notify the bank. McNeely Co. *v.* Bank of North America, 221 Pa. St. 588, 70 Atl. 891, 20 L. R. A. (N. S.) 79, n. (1908). But if the bank has suffered no injury, the delay is no defence. Pratt *v.* Union National Bank, 79 N. J. L. 117, 75 Atl. 313 (1909); Murphy *v.* Metropolitan National Bank, 191 Mass. 159, 77 N. E. 693, 114 Am. St. Rep. 595 (1906).

<sup>2a</sup> The duty of the drawee is to do only what a reasonably prudent person would be expected to do, and it does not require him, when the signature of the drawer, which he did not know, has been forged by one falsely impersonating the payee, and there is no reason to suspect wrong doing, to investigate to see whether the indorsements are forgeries. Murphy *v.* Metropolitan National Bank, 191 Mass. 159, 77 N. E. 693, 114 Am. St. Rep. 595 (1906). See also Jordan Marsh Co. *v.* National Shawmut Bank, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) 250 (1909).

<sup>3</sup> Frank *v.* Chemical National Bank, 84 N. Y. 209; Lieber *v.* Fourth National Bank, 137 Mo. App. 158, 117 S. W. 672 (1909); Kenneth Investment Co. *v.* National Bank, 103 Mo. App. 613, 77 S. W. 1002 (1903); Masonic Benefit Ass. *v.* First State Bank, 99 Miss. 610, 55 So. 408 (1911).

<sup>4</sup> Bixen *v.* National Bank, 5 Utah 504, 18 Pac. 43; Lieber *v.* Fourth National Bank, 137 Mo. App. 158, 117 S. W. 672 (1909).

from the bank on the money counts if the amount has been charged to the drawer.<sup>1</sup> That constitutes an acceptance of the check, and the bank holds the money for the true owner; if it pays to a wrongful holder, or any one not entitled to receive, it must repay.<sup>1a</sup>

When a check is paid on a forged indorsement, the payee may bring suit on it as though there had been no indorsement or payment; or if it had not been issued by the drawer, he may recover the amount from the bank.<sup>2</sup> And the latter cannot avoid liability for having paid out money on a forged indorsement by showing that it acted in good faith.<sup>2a</sup>

<sup>1</sup> § 474. *Millard v. National Bank of Republic*, 3 McArthur (D. C.), 54 (1878); *Farmer v. Bank*, 100 Tenn. 187, 47 S. W. 234; *Knoxville Water Co. v. East Tenn. National Bank*, 123 Tenn. 364, 131 S. W. 447 (1910); *Brown v. People's National Bank*, 170 Mich. 416, 136 N. W. 506, 40 L. R. A. (N. S.) 657, n. (1912).

An unauthorized indorsement is equivalent to a forged indorsement in this respect. *Knoxville Water Co. v. East Tenn. National Bank*, *supra*.

The money is still the property of A. and is subject to be appropriated by A. *Union Biscuit Co. v. Springfield Grocer Co.*, 143 Mo. App. 300, 126 S. W. 996 (1910).

<sup>1a</sup> If the bank pays to one who falsely impersonates the payee and indorses the check in the payee's name it is liable to the drawer of the check in the absence of negligence on his part, as it must ascertain at its peril the identity of the person named in the check as payee. *Murphy v. Metropolitan National Bank*, 191 Mass. 159, 77 N. E. 693, 114 Am. St. Rep. 595 (1906). But the bank is not liable for payment to an impostor to whom the drawer delivered the check and intended payment to be made, believing him to be the person whose name he had assumed. *Land Title etc. Co. v. Northwestern National Bank*, 211 Pa. St. 211, 60 Atl. 723, 107 Am. St. Rep. 565 (1905). See also *McHenry v. Old Citizen's National Bank*, 85 Ohio St. 203, 97 N. E. 395 (1907); *Boatman v. Stockmen's National Bank*, 56 Colo. 495, 138 Pac. 764, 50 L. R. A. (N. S.) 107 (1914). But see *Tolman v. American National Bank*, 22 R. I. 462, 48 Atl. 480, 84 Am. St. Rep. 850, 52 L. R. A. 877 (1901).

When A. has sent a deed to a stranger to be executed and has telegraphed a bank to pay the stranger if the deed is regular, the bank is not liable for making the payment. *Central National Bank v. National Bank*, 31 App. Cas. (D. C.) 391, 17 L. R. A. (N. S.) 520 (1908).

And when a bank pays the agent of the drawer of a check on a forged indorsement and the agent subsequently pays his principal the money in settlement of his claim, the bank is not liable to the drawer, since he has not been damaged. *Andrews v. Northwestern National Bank*, 107 Minn. 196, 117 N. W. 621, 25 L. R. A. (N. S.) 996, n. (1906).

<sup>2</sup> *Indiana National Bank v. Holtsclaw*, 98 Ind. 85 (1884); *Seventh National Bank v. Cook*, 73 Pa. St. 483; *Dodge v. National Exchange Bank*, 20 Ohio St. 246.

<sup>2a</sup> *Georgia Railroad Co. v. Society*, 85 Ga. 297, 11 S. E. 616; *German Savings Bank v. Citizens' National Bank*, 70 N. W. 769; *United Security Life Insurance and Trust Co. v. Central National Bank*, 185 Pa. St.

Where the bank *credits* the amount of the check to the correspondent from whom it is received, it may, upon discovering the forgery, repudiate the credit and surrender the check, thus relieving itself of liability to the payee.<sup>2b</sup>

*Check must be Paid according to Drawer's Directions*

Where a check is drawn payable to the order of any actually existing person or corporation, if the order or indorsement of such payee is forged, payment by the bank is no acquittance.<sup>2c</sup>

586, 40 Atl. 97; *Hatton v. Holmes*, 97 Cal. 208; *First National Bank v. Pease*, 168 Ill. 40, 48 N. E. 160; *Cripper, Lawrence & Co. v. American National Bank*, 51 Mo. App. 508; *Harmon v. Old Detroit National Bank*, 153 Mich. 73, 116 N. W. 617, 126 Am. St. Rep. 467, 17 L. R. A. (N. S.) 514, n. (1908).

Query, if the negligence of the drawer made possible the transaction. *Weisberger Co. v. Barborton Savings Bank*, 84 Ohio St. 21, 95 N. E. 379, 34 L. R. A. (N. S.) 1100, n. (1911).

The bank cannot rely upon the attestation of the payee's signature by the agent of the drawer. *Merchants' Bank v. Prudential Insurance Co.*, 110 Mo. App. 62, 84 S. W. 101 (1904).

A demand is not a condition precedent to suit. *Pratt v. Union National Bank*, 79 N. J. L. 117, 75 Atl. 313 (1909).

<sup>2b</sup> *Freeman's Savannah Bank*, 88 Ga. 253, 14 S. E. 577.

<sup>2c</sup> *First National Bank v. Pease*, 68 Ill. App. 562; *Tolman v. American National Bank*, 22 R. I. 462, 48 Atl. 480, 52 L. R. A. 877 (1901).

If the payee named is a fictitious person, the indorsement of the name of such fictitious party is a forgery, and the bank cannot defend under the statute since that applies only to cases where the drawer knowingly draws the check to the order of a fictitious payee. *Harmon v. Old Detroit National Bank*, 153 Mich. 73, 116 N. W. 617, 126 Am. St. Rep. 467, 17 L. R. A. (N. S.) 514, n. (1908).

If the payee was dead before the drawing of the check and his name is forged by one impersonating him, payment by the bank is no acquittance, as the drawer's rights in such a case are not enlarged. *Murphy v. Metropolitan National Bank*, 191 Mass. 159, 77 N. E. 693, 114 Am. St. Rep. 595 (1906).

When an agent who has a general power of attorney to draw checks draws one to a person who has no right to it or its proceeds, and whom the drawer does not intend to receive them, his indorsement by the one who drew the check is no forgery and the bank is not responsible for paying the check. *Synder v. Corn Exch. National Bank*, 221 Pa. St. 599, 70 Atl. 876, 128 Am. St. Rep. 280 (1908). Especially is this true when the draft is also payable to bearer. *Bartlett v. First National Bank*, 247 Ill. 490, 93 N. E. 337 (1910).

But in *United States v. National Bank*, 205 Fed. 433 (1913) the court held that it was the duty of the bank in making payment to ascertain whether there was such a person as the party named in the check and to know that the one presenting the check was entitled to receive payment thereof, and that the knowledge of the Government's disbursing agent

The depositor has directed payment to be made in a certain manner; a payment made otherwise than according to his directions is no discharge of the bank's obligations towards him.<sup>2d</sup> Neither has the holder, under a forged indorsement, any title to the paper, or any right to receive payment upon it.<sup>3</sup>

The law has been clearly laid down in an Ohio case to the following purport: The undertaking of the banker with his customers is to pay their checks or bills according to the law merchant. A check or bill, payable to order, is authority to the banker only to pay it to the payee, or to any person who becomes holder by a genuine indorsement. If there be a genuine indorsement in blank, it is authority thereafterward to pay to any person who seems to be the holder. The banker can charge his customer with no payments save those made as afore described, unless there be circumstances which amount to a direction from the customer to that the check was payable to a fictitious payee was not the knowledge of the Government.

<sup>2d</sup> The contract between the bank and the depositor is that it will pay out his money only when he directs and in accordance with his express directions. *Western Union Tel. Co. v. Bi-Metallic Bank*, 17 Colo. App. 229, 68 Pac. 115 (1902); *National City Bank v. Third National Bank*, 177 Fed. 136 (1910); *Goodfellow v. First National Bank*, 71 Wash. 554, 129 Pac. 90, 44 L. R. A. (N. S.) 580 (1913); *McNeely Co. v. Bank of North America*, 221 Pa. St. 588, 70 Atl. 891, 20 L. R. A. (N. S.) 79, n. (1908).

When payment is to be made to the order of a person named in the check and he orders it paid to another person it is the duty of the bank to see that the signature of the payee is genuine, and the fact that the bank makes payment on the guaranty of another bank and adopts the convenience of a clearing house system will not relieve it of its duty; and the duty is the same whether the payee is fictitious, or non-existing or actually existing, and the negligence of the drawer will not relieve the bank of its liability unless such was the proximate cause of the payment. *Jordan Marsh Co. v. National Shawmut Bank*, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) 250 (1909).

The burden of proof is upon the bank to show that it has paid out money which it seeks to charge against its customer's deposit, upon proper authority from the customer. *Chicago Savings Bank v. Block*, 126 Ill. App. 128 (1908).

<sup>3</sup> *Vanbibber v. Bank of Louisiana*, 14 La. Ann. 481; *Morgan v. Bank of State of New York*, 1 Duer (N. Y.), 434; 11 N. Y. 404; *Graves v. American Exchange Bank*, 17 N. Y. 205; *Coggill v. American Exchange Bank*, 1 N. Y. 113; *Talbot v. Bank of Rochester*, 1 Hill (N. Y.) 295; *Canal Bank v. Bank of Albany*, *id.*, 287; *Story on Bills*, § 451; *Sharswood's note to Byles on Bills*, p. \*21; *Citizens' Bank v. Importers and Traders' Bank*, 119 N. Y. 195, 23 N. E. 540; *National Dredging Co. v. Farmers' Bank*, 6 Penn. (Del.) 580, 69 Atl. 607, 130 Am. St. Rep. 158, 16 L. R. A. (N. S.) 593 (1908); *Hamilton National Bank v. Nye*, 37 Ind. App. 464, 77 N. E. 295 (1905); *National City Bank v. Third National Bank*, 177 Fed. 136 (1910).

the banker to pay without reference to the genuineness of the indorsement, or circumstances equivalent to a subsequent admission by the customer of the genuineness of the indorsement, in reliance upon which the banker has been induced so to alter his position as to preclude the customer from showing the indorsement to be forged.<sup>4</sup>

The clearest statement of the principle upon which this rule is based is to be found in a Louisiana case, substantially as follows:—

(a) When the bank has agreed to fulfil the drawer's instructions, the amount called for by the check becomes at once the money of the payee, who can hold the bank responsible for it. Thus, if a check be payable to the order of A., and B. obtains possession of it, fraudulently indorses it, presents it for payment, and obtains payment, then the bank by the act of paying agrees to pay the drawer's draft for that amount in favor of A.; but not having in fact done so, it may be held to refund the amount to A. "The bank, from the moment it undertakes to pay the check, holds the amount of the check as agent of the payee, and is responsible to the payee, as his agent, if it pays it upon a forged indorsement."<sup>5</sup> And even where the last indorsement is genuine the bank is not relieved from the duty of looking to the genuineness of prior indorsements.<sup>5a</sup>

(b) The following is a Pennsylvania case, also sustaining the same doctrine. A bank paid a check on which the indorsement of the payee was forged by the payee's clerk, and deducted the

<sup>4</sup> *Dodge v. National Exchange Bank*, 20 Ohio St. 234, following *Robarts v. Tucker*, 16 Q. B. 560; *Shaffer v. McKee*, 19 Ohio St. 526; *Western Union Tel. Co. v. Bi-Metallic Bank*, 17 Colo. App. 229, 68 Pac. 115 (1902); *McNeely Co. v. Bank of North America*, 221 Pa. St. 588, 70 Atl. 891, 20 L. R. A. (N. S.) 79, n. (1908).

<sup>5</sup> *Vanbibber v. Bank of Louisiana*, 14 La. Ann. 481; *Dodge v. National Exchange Bank*, 20 Ohio St. 234.

<sup>5a</sup> *The Atlanta National Bank v. Burke*, 81 Ga. 599, 7 S. E. 738; *First National Bank v. Brewer*, 7 Ind. App. 685; *Armstrong v. National Bank*, 46 Ohio St. 512, 22 N. E. 866; *Jordan Marsh Co. v. National Shawmut Bank*, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) 250 (1909).

And if the check or warrant comes to the drawee through other banks it must still use due diligence to identify the payee, and if it relies on the identification of the bank which has cashed the check it does so at its own risk, as such bank's negligence is imputable to it. The duty of identification is not changed by the time or place of the forgery, since they are immaterial unless the forgery was committed under such circumstances as to show negligence on the part of the drawer. *Harmon v. Old Detroit National Bank*, 153 Mich. 73, 116 N. W. 617, 126 Am. St. Rep. 467, 17 L. R. A. (N. S.) 514, n. (1908).

amount paid from the drawer's account, to which apparently the drawer made no objection. The payee having afterwards got possession of the check from the drawer, to whom it had been returned by the bank upon balancing the bank-book, presented it to the bank, and demanded payment. The bank refused payment, and the payee sued to recover. The verdict was for the payee. Upon appeal, the court said that, since the bank had retained the amount from the drawer's account the case might come within the exception laid down toward the close of the opinion in *Bank of Republic v. Millard*.<sup>6</sup> "It is in fact an acceptance, and binds the bank as a certified check does." The court do not seem to have felt quite clear or positive about the law, but were resolved to sustain the verdict, and consoled themselves with the reflection that "on the merits the case was for the plaintiff."<sup>7</sup>

But the case cited by the Pennsylvania court affords a very slender and dubious basis for the decision of that court, and directly controverts the position of the Louisiana and Ohio cases, *supra*. A check payable to the order of M. was paid to another person, on the faith of a forged indorsement. Afterward M. recovered possession of it, presented it, and demanded payment. This was refused, and M. brought suit in his own name against the bank. Mr. Justice Davis, having laid down the general doctrine that the bank can be held in a suit by the payee of a check only when it has accepted, or in some way undertaken to pay the check, proceeded as follows: "The defendant did not accept the check for the plaintiff, nor promise him to pay it, but, on the contrary, refused to do so. If it were true, as the evidence tended to show, that the bank, before the check came to the plaintiff's hands, paid it on a forged indorsement of his signature to a person not authorized to receive the money, it does not follow that the bank promised the plaintiff to pay the money again to him, on the presentation of the check by him for payment. It may be, if it could be shown that the bank had charged the check on its books against the drawer, and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the ground that the rule of *æquo et bono* would be applicable, as the bank, having assented to the order, and communicated its assent to the paymaster, would be considered as holding the money

<sup>6</sup> 10 Wall. 152, 19 L. ed. 897.

<sup>7</sup> *Seventh National Bank v. Cook*, 73 Pa. St. 483.

thus appropriated for the plaintiff's use, and therefore under an implied promise to pay it on demand." <sup>8</sup>

(c) Against the bank's liability the argument is that the bank cannot be expected to know the signature of any random member of the community in whose favor a depositor may have occasion to draw a check payable to order.<sup>9</sup> This is most true; but the answer is that, whenever a check is made payable to order, the bank has an unquestionable right to assure itself of the genuineness of the order before making the payment. Nor could the bank be compelled to take any trouble for this purpose. It is universal custom for the bank to require the holder of such a check to bring satisfactory evidence upon this point.<sup>10</sup>

### *Payment to Another of Same Name*

The case of *Graves v. The American Exchange Bank* <sup>11</sup> certainly carries the liability of the bank to an extreme, and it may be to an excessive point. The rule is there laid down, that if a check be made payable to a person, and another person of precisely the same name, or initials, so far as these are written out in the check, comes wrongfully or accidentally into possession of the same, indorses it, and obtains the money on it from the bank, still the bank is liable to make good the amount to the drawer. The logical sequence which leads to this goal is clear enough. The drawer has ordered payment to be made to the order of one person, and it has been made to the order of another; consequently, payment has not been made according to the drawer's direction, and the bank is not discharged *pro tanto*. The indorsement is a forgery.<sup>12</sup>

<sup>8</sup> *National Bank of Republic v. Millard*, 10 Wall. 152, 19 L. ed. 897.

<sup>9</sup> Thus it has been held in England that a bank instructed by its customer to accept bills of exchange which a correspondent of the customer would draw against certain bills of lading, is not bound to ascertain the genuineness of the bills of lading before acceptance. *Woods v. Thiedemann*, 1 H. & C. 478.

<sup>10</sup> *Roberts v. Tucker*, 16 Q. B. 560, per Maule, J., at p. 578.

<sup>11</sup> 17 N. Y. 205; see also *Beattie v. National Bank*, 174 Ill. 571, 51 N. E. 602. In this case the middle initial was not recognized as part of a name. See *Harmon v. Old Detroit National Bank*, 153 Mich. 73, 116 N. W. 617, 126 Am. St. Rep. 467, 17 L. R. A. (N. S.) 514, n. (1908).

<sup>12</sup> But when a bank by mistake informs a person that a sum of money has been deposited to his credit, whereupon he writes to the bank requesting that a draft for the amount of the same be sent to him, and upon its receipt indorses it and procures the money, his indorsement is not a forgery, and H. who has known him for two years, to whom he showed the correspondence from the bank, and in whose presence he opened the letters containing the draft, and to whom he indorsed, and received the money



This is plain reasoning. Yet it would seem that the bank ought to be protected in such a case. A reasonable limit should be set to its liability. It cannot be supposed to have such cognizance of the private affairs of each depositor as to know in favor of what individuals he is going to draw his several checks. This is clearly impossible. The depositor orders payment to be made to one A. B. An A. B. presents the order and indorses it; the bank knows him to be A. B., or obliges him to prove himself to be A. B., and then pays him. Without the gift of divination, what more can they do? They have used all the means of identification which the drawer has placed at their disposal, and if these have only led them into error, it is certainly rather his fault than theirs. He gives them nothing but a name to guide them in selecting the payee from the various members of the community; they do all that can be done with this sole means of distinction. If the name is not enough, but should have been supplemented with descriptive language, setting forth the true payee's profession, abode, place of business, etc., the drawer should have known this necessity and provided for it. If he depends upon the name alone, should he not be held to take the risk of its sufficiency as a sole means of identification? He had some degree of personal knowledge of the payee, and the bank very probably had not one particle. It does its best with the light it has. The drawer has not done his best by the light he had. Clearly justice demands that the drawer should suffer in case of error induced by such a state of affairs. But though the propriety of the ruling may be criticised, it must be admitted that it lays down the only adjudicated law in the premises, except a remark made in an old case in New Hampshire.<sup>12</sup> The only English authority is to the same effect. It is to be found in the case of *Mead v. Young*,<sup>13</sup> which was cited as an authority in *Graves v. American Exchange Bank*, and which appears fully to support that decision. It may be worth noticing, that in the American case Judge Roosevelt dissented. The technical rule of law declaring the indorsement a forgery is too strong for the principles of justice.<sup>13a</sup>

A pension agent sent a check addressed to H. and payable to him, but to *the wrong post-office*, whereby another person of the same name received the check, forged the indorsement, and got therefor may recover from the bank. *Heavy v. Commercial National Bank*, 27 Utah 222, 75 Pac. 727, 101 Am. St. Rep. 966 (1904).

<sup>12</sup> *Foster v. Shattuck*, 2 N. H. 446.

<sup>13</sup> 4 T. R. 28.

<sup>13a</sup> See, however, *Thomas v. First National Bank*, 101 Miss. 500, 58 So. 478 (1912).

the money. H. recovered of the bank; it had accepted the check, and from that moment held the money for the true payee.<sup>14</sup>

W. drew a check on defendant bank payable to Max Roth, who lived in New York City. W. put the check in an envelope and addressed it to Max Roth, Cleveland, Ohio, who received it and indorsed it. In an action by W. the court *held* that he could not recover on the ground that he was the first at fault and his mistake made possible what transpired.<sup>14a</sup>

Where a bank pays to another whose name is pronounced like that of the payee, but differently spelled, whether it was negligent is a question of fact on all the circumstances.<sup>15</sup>

This is the true question. It will not do to say the bank has not paid to the person to whom the drawer ordered payment, therefore it is liable; the question is, whose fault is it that a mistake has been made. The bank is only bound to the exercise of ordinary care in obeying the drawer's instructions; if it does this and loss follows, the depositor must bear it, just as if he has been doing the work himself.

(d) **Proceeds of Forged Checks. Drawer's Right.**—If, before the title to a check has passed to any other person than the drawer, it be dishonestly or fraudulently obtained from him, and the money collected upon it through a forged indorsement, even though the party who finally actually collects the money is an innocent holder for value, the drawer may maintain his action to recover the amount from the party so having collected the money.<sup>16</sup> Nor does it affect the drawer's right to recover that his bank has been guilty of such laches in notifying the forgery to the innocent receiver of the money as to have lost any right it might otherwise have had to recover from that receiver.<sup>17</sup>

*Real Point is, that if the Loss is Due to Previous Neglect of Drawer, He cannot Hold the Bank*

(e) Two Louisiana cases<sup>18</sup> are quoted by some writers as sustaining the broad proposition that a bank is not required to pay

<sup>14</sup> *Indiana National Bank v. Holtsclaw*, 98 Ind. 85.

<sup>14a</sup> *Weisberger Co. v. Barberton Savings Bank*, 84 Ohio St. 21, 95 N. E. 379 (1911).

<sup>15</sup> *White v. Springfield Institute*, 134 Mass. 232. If the check is indorsed the question of *idem sonans* cannot arise. *Western Union Tel. Co. v. Bi-Metallic Bank*, 17 Colo. App. 229, 68 Pac. 115 (1902).

<sup>16</sup> *Talbot v. Bank of Rochester*, 1 Hill (N. Y.) 295.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Levy v. Bank of America*, 24 La. Ann. 220 (1872); *Smith v. Mechanics' Bank*, 6 La. Ann. 610 (1857).

again merely because of a forged indorsement on the paper it has cashed; that it is obliged to know that the signatures of the drawer and presenter are genuine, but is not required to know intermediate signatures, nor "can it properly refuse payment until assured that these are correct." This comes of citing cases by their head-notes without comparing them with the language of the opinions. What the cases really decide is, that if the drawer increases the risk of the bank, and throws upon the bank the responsibility which he ought to bear himself, the bank is not liable to the drawer, though it would be to any real payee whose name was forged. As deciding what is the drawer's duty and what sort of neglect on his part will prevent his holding the bank, the cases are interesting, and we give them briefly.

In *Smith v. Mechanics & Traders' Bank*, a broker bought a bill from A. purporting to have been accepted by Payne & Harrison, and gave A. a check payable to the order of Payne & Harrison, so that A. would have to go to them to get their indorsement, thus guarding against forgery in the acceptance. The fact was, that the acceptance was forged, and that A. forged the indorsement of Payne & Harrison, and drew the money. *Held*, that Payne & Harrison could undoubtedly recover from the bank if they had any interest in the check, but that the broker could not make the bank pay again, for he was guilty of the earlier neglect in taking the bill without inquiry, and in giving A. a check payable to the order of a person whose signature was not in the bank.

Slidell dissented, on the ground that the depositor ordered the bank to pay to the order of Payne & Harrison, and that the bank had not done so. The bank certainly was guilty of great neglect; it paid on an indorsement not even purporting to be correct, for it was written Payne & Harrin.

*Levy v. Bank of America* was a very similar case, and put on precisely the same ground. In each case the instrument bought by the check was a forgery, and the purchasers issued their checks to unknown persons, but in the name of the payees of the forged instruments, for the acknowledged purpose of throwing upon the bank the responsibility of paying the right party, and saving themselves the trouble of inquiry.

The court thought the drawers of the checks could not be allowed to throw upon the bank by such manœuvre the losses brought upon them by their own neglect, and said that the cases cited in opposition came under the general rule that banks pay checks to order at

their own risk, *when their customers in drawing the checks have done nothing to create or increase that risk, as in these cases.*

(f) The United States Supreme Court<sup>19</sup> denies the right of the true owner of a check to recover of the bank unless the check has been accepted, holding that neither a settlement between the bank and the drawer allowing for the check paid on a forged indorsement, nor the payment to the wrong party, constituted an acceptance of the check, and that the right of the true owner to sue the bank could not be based on such facts. In *Bank v. Millard*, the court said: "It may be that if the bank has charged the amount of a check to the drawer, and settled with him on that basis, the plaintiff could recover." In *Bank v. Whitman*, the court remarked that it was "difficult to construe a payment as an acceptance under any circumstances", and held that at any rate a payment by *mistake*, and charged to the drawer in a settlement, as in case of payment on a forged indorsement, could not let in the holder to sue the bank. The bank supposed that it had paid the check, but this was an error.

§ 475. **English Statute Law.** — 16 & 17 Vict. c. 59, § 19, provides that, if a check purports to be signed by the payee or any person to whose order it may be drawn, it is sufficient authority to the drawee to pay the amount. The bank will not be obliged to prove any indorsement. An indorsement "per procuration", or "as agent", is within the statute, as purporting to be the signature of the proper party.<sup>1</sup>

### *English Cases not Good Here*

English cases concerning checks payable to order, and upon which the payee's signature has been forged, are not capable of being used as precedents in the United States. The law governing this part of the general subject of checks is in England matter of statute. Originally, Parliament enacted that all checks should be drawn payable "to bearer", or "to A. or bearer." An instrument, in form a check, but drawn payable to order, was regarded as an inland bill of exchange, and had to be stamped as such. It

<sup>19</sup> *National Bank of Republic v. Millard*, 10 Wall. 152, 19 L. ed. 897; *First National Bank of Washington v. Whitman*, 94 U. S. 343, 24 L. ed. 229 (1876).

<sup>1</sup> § 475. *Charles v. Blackwell*, 1 Com. P. D. 548, aff. 2 *id.*, 151. See *Ogden v. Benas*, Law R. 9 Com. P. C. 513. The law does not protect any one else than the drawee.

was only as the great use of checks in increasing the business facilities of the country became by degrees more fully appreciated that the abandonment of this restrictive law was accomplished. It is by a very recent act of Parliament that checks drawn payable to order have been legalized in their proper character as checks rather than inland bills.<sup>2</sup> But the same act has a further provision, exempting the banker from liability if the original or any subsequent indorsement be forged.<sup>3</sup> This causes the effect of the law as a whole to be rather slight. A check payable to order, where the banker is under no liability if he pays on a forgery of the order, is only a very small degree better than a check payable to bearer. The practical advantage of the rule must depend wholly upon the conscientiousness and assiduity of the banker; and where no legal punishment for neglect, however gross, short of positive bad faith, exists, there is likely always to be serious danger of its occurrence.

§ 476. **Money Paid on a Forged Indorsement** may be recovered at any time that the forgery is discovered, whether the holder has lost by the delay or not, except when the drawer has made himself liable on the paper or the holder took on faith of a certification. Generally, a bank paying money on a forged indorsement may recover it from the holder, for neither acceptance nor payment admits any indorsement.<sup>1</sup> "Money paid by one party to another

<sup>2</sup> 16 & 17 Vict. c. 59. See also *Hare v. Copland*, 13 Ir. Cl. 426.

<sup>3</sup> 16 & 17 Vict. c. 59, § 19, expressly accepted from repeal in 33 & 34 Vict. c. 99.

<sup>1</sup> § 476. *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.) 287; *White v. Continental National Bank*, 64 N. Y. 320; *Levy v. Bank*, 27 Neb. 557, 43 N. W. 354, citing *Walsh v. Rogers*, 15 Neb. 309, 18 N. W. 135; *Leather Manufacturers' Bank v. Merchants' Bank*, 128 U. S. 26, 32 L. ed. 342, 9 Sup. Ct. 3; *People's Bank v. Franklin Bank*, 88 Tenn. 304, 12 S. W. 716; *Farmers' National Bank v. Farmers' etc. Bank*, 159 Ky. 141, 166 S. W. 986, 1915A L. R. A. 77, n.; *Wellington National Bank v. Robbins*, 71 Kan. 748, 81 Pac. 487, 114 Am. St. Rep. 523 (1905). The last case holds that if the drawee bank has paid a check which has been indorsed by X subsequent to the forgery it may, if, when sued for the amount of the check, it gives X notice and requests him to take charge of the defence and he does not do so, recover from him what it is obliged to pay on the check together with all reasonable attorney's fees and expenses.

But if the signature is also forged the drawer, since the adoption of the Negotiable Instrument Law, cannot recover the money paid to a *bona fide* holder, even though the indorsement was guaranteed. *Cherokee National Bank v. Union Trust Co.*, 33 Okla. 342, 125 Pac. 464 (1912).

When a bank receiving a check for collection collects the same and pays the money to the depositor, it may, upon discovery of the forgery and repayment of the proceeds, appropriate funds of the depositor in its hands

through a mutual mistake of facts, *in respect to which both were equally bound to inquire*, may be recovered back.”<sup>1</sup> But if the holder could himself recover of the drawer, as where the latter issued the paper with the forged signature on it, the bank could recover of the drawer, and therefore has no need to sue the holder.<sup>2</sup>

(a) It seems that, if the check should be drawn payable to order, and the name of the payee should be indorsed *by the drawer himself*, then the bank would not be able to collect from the party to whom it had made payment. For the payee is a stranger to the transaction, and his indorsement is not necessary in order to pass title in the paper; and the bank, having paid under such circumstances, is entitled to charge the amount to the drawer, or, in the absence of sufficient funds of the drawer, may have an action against him.<sup>3</sup>

*Indorsement Forged. Bank may Recover, though the Holder has been Prejudiced by the Delay in Discovery of the Forgery*

(b) In the regular course of business the N. Bank took a check drawn on the C. Bank. The latter paid it (\$19,000). The check was dated November 9, 1874. December 3, the C. returned it to the drawer. March 23, 1876, the drawer notified C. that the payee's name had been forged, sued C., and recovered the amount withheld by it on account of the check. No measures to test the genuineness of the signature were taken by C. or by the drawer until March 23, 1876. The depositor in the meantime had become insolvent, and the position of the N. Bank had therefore been

to its reimbursement and is under no obligation to notify the depositor of the forgery. *Green v. Purcell National Bank*, 1 Ind. T. 270 (1896).

Negligence may be so gross that it will prevent recovery. *Bartlett v. First National Bank*, 247 Ill. 490, 93 N. E. 296 (1910).

The United States is not presumed to know the signature of the many persons entitled to receive pensions, and the exceptional rule in certain classes of commercial paper that he who has knowledge of the genuine signature of the payee whose name is forged is negligent in paying on such an indorsement and so cannot recover does not apply to the United States in regard to pension checks, and demand or giving notice of the forgery which by operation of legal warranty was presumably within the knowledge of the bank are not conditions precedent to a right of recovery. *United States v. National Exchange Bank*, 214 U. S. 302, 53 L. ed. 1006, 29 Sup. Ct. 665 (1909).

<sup>2</sup> *Hortzman v. Henshaw*, 11 How. 177, 13 L. ed. 653.

<sup>3</sup> *Coggill v. American Exchange Bank*, 1 N. Y. 113; and see *Meacher v. Fort*, 3 Hill (S. C.) 227.

altered to its injury. It was nevertheless held that the C. Bank was not bound to ascertain the genuineness of the indorsement before paying the check, *and was not estopped by the delay*; that the N. was liable for the amount of the check with simple interest from the date of payment, but not for the costs of the drawer's suit against C. Evidence of a usage among banks in the city of the C. Bank, making it the duty of a bank to examine an indorsement and satisfy itself of its genuineness, was excluded.<sup>4</sup>

In questions arising between the bank and the person to whom the bank has made payment, the rule is exceedingly clear. Of course, if the bank pays the forger, or any person cognizant of the forgery, it would be entitled to recover back from him if it should have opportunity.<sup>5</sup> But the rule was laid down in the case of *Canal Bank v. Bank of Albany*,<sup>6</sup> that acceptance and payment, or either, concludes the drawees as against the payees only as to the genuineness of the drawer's signature. If anywhere in the chain of indorsements to order there is a forgery, the bank may recover, no matter how long a time has elapsed since payment, provided it acts with due promptitude upon discovery. The court would not allow the rigid rule of *Cocks v. Masterman*<sup>7</sup> to govern in these cases. The reason is that, since title to the paper made or indorsed as payable to the order of any person can only be passed by the signature of that person, therefore, if the genuine signature be lacking, the title has not passed. The bank has paid under a mistake of fact to a person whom it believes to have the title, but who has it not. There is practical sense at least in the rule; for, if a bank having a check presented for payment, which has been transferred by a long series of indorsements, is to be obliged to examine into the genuineness of every one of them, it is a very grave burden. Of course it must be liable to the drawer if it pay on a forgery. But it may well be allowed to place confidence in the presenter, and to consider that he in presenting it warrants the accuracy of his title to it, acquired through the indorsements. Then, if the bank knows him to be responsible, it may at once pay him the amount, fairly expecting that, if there

<sup>4</sup> *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74. See *Missouri Lincoln Trust Co. v. Third National Bank*, 154 Mo. App. 89, 133 S. W. 357 (1910).

<sup>5</sup> *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.) 287; *Talbot v. Bank of Rochester*, *ib.*, 295; *Coggill v. American Exchange Bank*, 1 N. Y. 113; *Dick v. Leverick*, 11 La. 573; *Smith v. Chester*, 1 T. R. 654.

<sup>6</sup> 1 Hill (N. Y.) 287.

<sup>7</sup> 9 Barn. & Cr. 92.

prove to be any irregularity, so that it is obliged to reimburse the amount to the drawer, it can save itself from the loss by recourse to the person at whose request, and to whom, it made the erroneous payment. Banks often require the presenter himself to indorse, even though the prior indorsements are in blank, for the purpose of being able to hold him as an indorser.

It is held that such an indorsement is an assurance of the genuineness of the paper in every respect, except only as to the signature of the drawer.<sup>8</sup>

(c) If a check on which an indorsement is forged be certified, the bank must pay it to a *bona fide* holder,<sup>9</sup> who took after the certification; "he who confides in the deceiver must suffer rather than a stranger."

§ 477. **Transfer warrants Genuineness of Paper.** — Whatever signature or indorsement is upon an instrument when issued by the drawer or maker will be deemed good against him in the hands of a *bona fide* holder. His delivery of the paper affirms its correctness, and if the name be forged the amount paid on the bill may be recovered by the drawee from the drawer.<sup>1</sup>

Any transferrer of negotiable paper by delivery, or by indorsement and delivery, like every other vendor of personal property, warrants his title, and that it is what it purports to be; and on this ground a bank paying upon a forged indorsement may recover from the party from whom it received the paper.<sup>2</sup> The very assertion of ownership is of itself a warranty of genuineness.

<sup>8</sup> Harris v. Bradley, 7 Yerg. (Tenn.) 310; Jones v. Ryde, 5 Taunt. 488; Wilkinson v. Johnson, 3 Barn. & Cr. 428. See New York Produce Exch. Bank v. Twelfth Ward Bank, 135 App. Div. 52 (1909), 119 N. Y. S. 988.

<sup>9</sup> Hagen v. Bowery National Bank, 64 Barb. (N. Y.) 197 (1872).

<sup>1</sup> § 477. Hortsman v. Henshaw, 11 How. 177, 13 L. ed. 653; Coghill v. American Exchange Bank, 1 N. Y. 113.

<sup>2</sup> National Bank v. Bangs, 106 Mass. 445; Burgess v. Northern Bank of Kentucky, 4 Bush (Ky.) 600; MacGregor v. Rhodes, 6 El. & B. 266; State Bank v. Fearing, 16 Pick. (Mass.) 533; White v. Continental National Bank, 64 N. Y. 320; Second National Bank v. Guarantee Trust etc. Co., 206 Pa. St. 616, 56 Atl. 72 (1903).

The bank's right of action arises immediately upon payment of the check, and it is not necessary that the bank have the possession of the paid check. United States v. National Bank of Commerce, 205 Fed. 433 (1913).

If the paper is also payable to bearer the forgery is immaterial. Bartlett v. First National Bank, 247 Ill. 490, 93 N. E. 337 (1910).



*Transfer Guarantees Indorsement*

An indorsement warrants the genuineness of all prior signatures,<sup>3</sup> as well the indorsement of a bank paying a check as any other. When a clerk indorses a check without authority, the bank collecting the check from the drawee guarantees the genuineness of the indorsement, and the drawee may recover of the said collecting bank.<sup>4</sup>

§ 478. **Forged Certification of Check.** — It has been held in New York that the recognition by a bank teller of a certification of a check drawn on the bank, such certification purporting to have been made by him, may thereafter estop the bank from denying the genuineness of the certification. It makes no difference, say the court, whether the teller writes "Timpson, Teller", or whether he states to the inquirer that the words, "Timpson Teller", already written, are genuine. The facts showed that a man purchased certain gold checks, and gave in payment a check purporting to be certified. The sellers of the gold immediately sent their clerk with the check to inquire if the certification were genuine; he quickly returned with the statement from the bank officer that it was. In fact, however, as was subsequently discovered, it was a forgery. The Court of Appeals sustained the verdict of a jury, which cast the loss upon the bank. The court held that the bank was estopped, by the declaration of its officer, to deny the genuineness. It made no difference that the brokers had taken no steps in consequence of the information; it was sufficient that they had refrained from taking steps which they might have taken had the reply of the bank officer been other than it was. It was true that they had delivered the gold checks to the purchaser, and he had left the office before the return of the clerk; but he had left only a very short time before the return, and the brokers might still have been able to stop the payment of their gold checks, or to arrest the purchaser or some accomplice. It is impossible to say certainly what they might have done, or with what actual

<sup>3</sup> *Star Fire Ins. Co. v. New Hampshire National Bank*, 60 N. H. 442; *Turnbull v. Bowyer*, 40 N. Y. 456; *Thrall v. Newell*, 19 Vt. 202; *Aldrich v. Jackson*, 5 R. I. 218; *State Bank v. Fearing*, 16 Pick. (Mass.) 533; *Merriam v. Wolcott*, 3 Allen (Mass.) 258; *City Bank v. First National Bank*, 45 Tex. 203; *Lobdell v. Baker*, 1 Met. (Mass.) 193; *First National Bank v. Farmers & Merchants' Bank*, 56 Neb. 149, 76 N. W. 430.

<sup>4</sup> *Central National Bank v. North River National Bank*, 44 Hun (N. Y.) 115 (March, 1887).

results; but it is sufficient to establish the estoppel that they lost the possibility of doing anything.<sup>1</sup>

### Fraudulent Alteration after Signature

§ 479. **As between paying Bank and Party receiving Money.**<sup>0</sup> — The bank which pays to any person the amount of a check, fraudulently altered after signature, may recover back from such person the amount so paid by it.<sup>1</sup> Where a bank acts as agent in collecting paper that turns out to be raised, and it has paid over the money to its principal, suit lies against the principal, and not against the agent bank,<sup>1a</sup> by the party who has mispaid.<sup>2</sup> Mere negligence in paying money does not prevent recovery if the receiver has not been misled or prejudiced by the mistake. This rule is not everywhere held to apply to the case of a drawee paying on a forgery of the drawer's signature, but does apply to

<sup>1</sup> § 478. *Continental National Bank v. National Bank of the Commonwealth*, 50 N. Y. 575. And to the point of estoppel, see *Casco Bank v. Keene*, 53 Maine 103; *Knights v. Wiffen*, Law Rep. 5 Q. B. 660; *Clews v. Bank*, 114 N. Y. 70, 20 N. E. 852.

<sup>0</sup> § 479. See *Crocker-Woolworth National Bank v. Nevada Bank*, 139 Cal. 564, 73 Pac. 456, 96 Am. St. Rep. 169, 63 L. R. A. 245 (1903).

<sup>1</sup> *Merchants' Bank of New York v. Exchange Bank of New Orleans*, 16 La. 457; and see *National Bank of Commerce v. National Mechanics' Banking Association*, 55 N. Y. 211; *Crocker-Woolworth National Bank v. Nevada Bank*, 139 Cal. 564, 73 Pac. 456, 96 Am. St. Rep. 169, 63 L. R. A. 245 (1903); *Continental National Bank v. Metropolitan National Bank*, 107 Ill. App. 455 (1903); *Colonial Bank of Australia v. Marshall*, (1096) A. C. 559; *Imperial Bank of Canada v. Bank of Hamilton* (1903) A. C. 49. But if the paying bank has been guilty of negligence or carelessness in not giving notice of the forgery after its discovery by reason of which the other party has been injured, it must bear the loss. *Continental National Bank v. Metropolitan National Bank*, *supra*.

<sup>1a</sup> But in such case the bank must not deal with the paper as though he was the owner thereof. *Crocker-Woolworth National Bank v. Nevada Bank*, 139 Cal. 564, 73 Pac. 456, 96 Am. St. Rep. 169, 63 L. R. A. 245 (1903).

<sup>2</sup> *National Park Bank v. Seaboard Bank*, 44 Hun (N. Y.) 49 (1887). It is a matter of common knowledge and experience that it is the custom of banks to take local checks for collection and not to buy them, and it will not be supposed that a bank which passes such a check through the clearing-house with the indorsement "pay only through clearing-house" stamped upon it is the general owner of the check and that the paying bank placed reliance upon such supposed ownership, and the general rule that one who presents a check for payment represents that the check is genuine does not apply when the check has upon it a specially restricted indorsement made for the purpose of collection through the clearing-house. *Crocker-Woolworth National Bank v. Nevada Bank*, 139 Cal. 564, 73 Pac. 456, 96 Am. St. Rep. 169, 63 L. R. A. 245 (1903).

the payment of a raised check; especially when the person receiving the money indorsed the check, that being a warranty of it. In such case the bank can recover the money, there being nothing in the circumstances to work an estoppel.<sup>3</sup>

§ 480. **As between Bank and Drawer.** — The rule requiring the bank to know the customer's handwriting was always confined to requiring a knowledge of his signature.<sup>1</sup> Neither any rule of law nor the ordinary course of business renders it a matter of suspicion that the body of the check or bill is not written in the handwriting of the maker or drawer. Nevertheless, a false or fraudulent alteration in a material particular, made in the body of the check or bill after signature, constitutes a forged instrument just as much as the simulating the signature itself. By such alteration the instrument is vitiated, even in the hands of a *bona fide* holder for value, although it might not be possible to discover the change even by a careful scrutiny.<sup>2</sup> Of course it follows, as between the bank and the depositor, that a payment by the bank is the loss of the bank; and such is the unquestionable rule,<sup>3</sup>

<sup>3</sup> City Bank of Houston v. First National Bank, 45 Tex. 203; National City Bank v. Wescott, 118 N. Y. 468, 23 N. E. 900; United States v. American Exchange National Bank, 70 Fed. 232; New York Produce Exch. Bank v. Twelfth Ward Bank, 135 App. Div. 52 (1909), 119 N. Y. S. 988.

<sup>1</sup> § 480. Merchants' Bank of New York v. Exchange Bank of New Orleans, 16 La. 457; Bank of Commerce v. Union Bank, 3 N. Y. 230; Marine National Bank v. National City Bank, 59 N. Y. 71; Weisser v. Denison, 10 N. Y. 68; Canal Bank v. Bank of Albany, 1 Hill (N. Y.) 287; National Bank of Commerce v. National Mechanics' Banking Association, 55 N. Y. 211; Bank of the United States v. Bank of Georgia, 10 Wheat. 333, at p. 355, 6 L. ed. 334; Jones v. Ryde, 5 Taunt. 488; Bruce v. Bruce, *id.*, 495; Hall v. Fuller, 5 Barn. & Cr. 750; Continental National Bank v. Tradesmen's National Bank, 36 App. Div. (Hun, N. Y.) 112; Snodgrass v. Sweetser, 44 N. E. 648; First State Bank v. Vogeli, 78 Kan. 264, 96 Pac. 490 (1908). But see Morris v. Beaumont National Bank, 37 Tex. Civ. App. 97, 83 S. W. 36 (1904) which says that a bank is held to the knowledge of the signature and handwriting of its customer.

In Missouri the court said that the doctrine should be stated more guardedly in that a drawee of a bill should look to the signature of the drawer, and may not escape responsibility by ignoring other parts of its face. Clifford Banking Co. v. Donovan Commission Co., 195 Mo. 262, 94 S. W. 527 (1906).

<sup>2</sup> Wade v. Withington, 1 Allen (Mass.) 561; Mahaiwe Bank v. Douglass, 31 Conn. 170; Belknap v. National Bank of North America, 100 Mass. 376; Chicago Savings Bank v. Block, 126 Ill. App. 128 (1906).

<sup>3</sup> Belknap v. National Bank of North America, 100 Mass. 376; Sewall v. Boston Water Power Co., 4 Allen (Mass.) 277; Morris v. Beaumont National Bank, 37 Tex. Civ. App. 97, 83 S. W. 36 (1904); Chicago Savings Bank v. Block, 126 Ill. App. 128 (1906); Union Biscuit Co. v. Spring-

except in those instances wherein the negligence or laches of the drawer of the check has laid the foundation for the error of the bank. If by any act of negligence upon his part, as by so carelessly writing the check as to render it easily open to material alteration without leaving evident traces for detection, the customer has furnished the opportunity for the fraud which has deceived the bank, then he must suffer the just consequence of his carelessness by bearing the loss himself.<sup>4</sup>

An old and leading case upon this point, well illustrating the duty of the drawer, is that of *Young v. Grote*,<sup>5</sup> which was as follows. A depositor going away from home, left with his wife several checks which he signed in blank, and which she was to fill up according to her needs. She filled up one for fifty-two pounds two shillings; but she began the word fifty with a small letter, and in the middle of a blank line; in writing the marginal figures, likewise, she left a considerable space between the mark £ and the figures 52. She gave the check in this form to her husband's clerk to get the money upon it. He inserted the words "three hundred" before the word "fifty" and the figure 3 before the figures 52 and then presented it and drew 352 pounds upon it. Here, of course, there were no perceptible marks indicating the alteration which had been made, and there were none such, because the check had been so carelessly written that the forgery was made the simplest matter in the world. Upon this ground, the court held that the loss must rest with the drawer. Only one remark may be made by way of criticising this case. It does not appear that the clerk in making his additions attempted to liken

field Grocer Co., 143 Mo. App. 300, 126 S. W. 996 (1910) (payee's name erased and another name written in).

<sup>4</sup> *Young v. Grote*, 4 Bing. 253; 12 Moore 484; *Orr v. Union Bank of Scotland*, 1 Macq. H. L. C. 513; *Bellamy v. Majoribanks*, 21 L. J. Exch. 73; *Hall v. Fuller*, 5 Barn. & Cr. 750; *Coles v. Bank of England*, 10 Ad. & El. 449; *Bank of Ireland v. Trustees*, 5 H. L. C. 410; *Grant v. Vaughan*, 3 Burr. 1525; *Johnson v. Windle*, 3 Bing. New R. 225; *Coggill v. American Exchange Bank*, 1 N. Y. 113; *Mahaiwe Bank v. Douglass*, 31 Conn. 170; *Wade v. Withington*, 1 Allen (Mass.) 561; *Belknap v. Bank of North America*, 100 Mass. 376; *National Dredging Co. v. Farmers' Bank*, 6 Penn. (Del.) 580, 69 Atl. 607, 130 Am. St. Rep. 158, 16 L. R. A. (N. s.) 593 (1908); *Otis Elevator Co. v. First National Bank*, 163 Cal. 31, 124 Pac. 704 (1912); *Clifford Banking Co. v. Donovan Commission Co.*, 195 Mo. 262, 94 S. W. 527 (1906); *First State Bank v. Vogeli*, 78 Kan. 264, 96 Pac. 490, 19 L. R. A. (N. s.) 402, n. (1908). *Byles on Bills*, p. 24; *Story on Promissory Notes*, § 490, note; *Grant on Bankers and Banking*.

<sup>5</sup> 4 Bing. 253; and see also *Zimmerman v. Rote*, 75 Pa. St. 188.

his handwriting to that of the wife. It is probable, therefore, that there were two different handwritings in the writing of the sum. This point was not adverted to at the trial of the cause, or at least is not mentioned in the report. But Mr. Grant, in commenting on the case, inclines to think that, if the body of the check had been in the handwriting of the drawer, which the bank was bound to know, then the insertion of words in another handwriting should have put the bank on inquiry. He is content, however, with a ruling which allows a diversity of hands not to be a point of suspicion, where neither of them is the hand of the drawer.<sup>6</sup>

In *Daniels v. Empire State Savings Bank*<sup>6a</sup> the following facts were presented. E. before going to Europe, left several checks signed in blank with D., the secretary, treasurer, and general manager of the Empire State Savings Bank, with instructions to fill them out from time to time, during her absence, as she should direct. After E.'s return D. filled up, without E.'s authority, a check for \$4000. This check was never entered in E.'s pass-book, nor returned to her, nor paid, but was used by D. to cover up his fraudulent transactions in the bank. The bank sought to charge the check to E. on the ground of D.'s agency<sup>6b</sup> and also because between two innocent parties she had made the loss possible and must bear it. *Held*, that D.'s agency had terminated and that the rule concerning two innocent parties did not apply. The whole business of the bank was intrusted to D. He was the bank and was not innocent. His knowledge was the knowledge of the bank. Another strong point in this case is the fact that the check had not been paid.

The mere fact that a person has so carelessly kept his check-book that another has obtained access to it, and has filled out one of his checks (forging his name thereto), does not constitute such negligence on his part as to justify the banker who has paid this check in charging the customer with the amount.<sup>7</sup> See § 470.

But a Pennsylvania case holds that where the customer has been lax in comparing the check, when returned from the bank,

<sup>6</sup> Grant on Bankers and Banking.

<sup>6a</sup> 92 Hun (N. Y.) 450.

<sup>6b</sup> In *Otis Elevator Co. v. First National Bank*, 163 Cal. 31, 124 Pac. 704, 41 L. R. A. (N. S.) 529, n. (1912) it is held that where the forgery is done by an agent of the depositor and consists of acts which are in the direct course of his employment and nothing exists to cause suspicion on the part of the bank, the bank is not liable for paying the check.

<sup>7</sup> *Bank of Ireland v. Trustees, etc.*, 5 H. L. Cas. 410; *Robb v. Pennsylvania Co.*, 186 Pa. St. 456, 40 Atl. 969.

with the amounts in his bank-book, check-book, etc., the bank is relieved from liability.<sup>7a</sup>

The case of *Belknap v. Bank of North America*<sup>8</sup> establishes a just and important limit upon the liability of the drawer. The depositor, who had his checks lithographed for his own use with his name upon the margin, signed the checks in blank, and gave them to his book-keeper to ascertain and fill in the proper amounts. The book-keeper made up the accounts with certain parties, ascertained the amounts due them, made memoranda thereof, and gave the blank checks and the memoranda to an assistant clerk, recently engaged, to fill them up. This assistant filled them up correctly, and returned them to the book-keeper, who enclosed them in envelopes, which he addressed and delivered to this same assistant to carry to the post-office. Subsequent circumstances indicated that the assistant opened two of the envelopes and abstracted the checks. The checks had been written to "A. or order," and to "B. or order." The thief drew a line through the words "or order" on each check, wrote above them the words "or bearer," and collected the money from the bank. The court said that they could not assume that it was careless on the part of the drawer to send the sealed letters to the post-office by a clerk who knew their contents, for the clerk could not obtain access to them except by committing a crime. The checks were not intrusted to him, as in the cases of *Putnam v. Sullivan*<sup>9</sup> and *Young v. Grote*.<sup>10</sup> The case was simply a payment by the bank made upon forged and vitiated paper; and it ought not to be submitted to the jury upon the question of the diligence or fault of the bank.

Where the drawer makes the check in favor of a stranger and it is subsequently forged by raising the amount, this is not sufficient evidence to hold the drawer negligent *per se*, and the drawer bank cannot recover from him. Only ordinary care and diligence is required of the drawer.<sup>10a</sup>

It is not negligence in the bank to pay the check before receiving notice from the depositor that it has been drawn. So simple a rule would seem hardly to require to be judicially affirmed; but in a Louisiana case, a party having attempted to show evidence of a custom on the part of the drawer to notify the bank, the court

<sup>7a</sup> *Myers v. Southwestern National Bank*, 193 Pa. St. 1, 44 Atl. 280.

<sup>8</sup> 100 Mass. 376.

<sup>9</sup> 4 Mass. 45.

<sup>10</sup> 4 Bing. 253.

<sup>10a</sup> *National Bank v. Notting*, 94 Va. 263, 26 S. E. 826.

said that the testimony introduced to show this usage was insufficient to show it to be so universal or so general as to have any binding force. In the absence of usage, the law did not require the bank to suspend payment until advised of the drawing.<sup>11</sup>

Generally, if the drawer of the check has taken such precautions against fraudulent alterations as have now become customary and proper, a material alteration will be almost sure to betray itself to any reasonable careful scrutiny; so that the burden of detection laid upon the bank is not often unduly severe. Still, the rule is an imperative one. It is not only because the bank ought to have made the discovery, and has not done so, that it is held liable; but because it has paid and so treated as valid a paper which is absolutely vitiated and void. The greater or less measure of difficulty incident to detecting the fraud does not, therefore, enter into the question at all;<sup>12</sup> or, at least, only indirectly, as bearing upon the question of the drawer's sufficient caution in preparing the instrument.

Though the foregoing would seem to be the true principle upon which the liability of the bank is based, yet the matter of the negligence of the bank is occasionally considered. "The greater negligence in a case of this kind," it has been said, "is chargeable on the party who received the bill from the perpetrator of the forgery."<sup>13</sup>

If a clerk, in writing the body of a check, write it so improperly or carelessly as to render alteration an easy matter, and such alteration is subsequently made, and the loss is cast by the bank upon the drawers by reason of the negligent manner of the writing of the check, it has been held that the drawers (who signed before the alteration) cannot hold the clerk liable to reimburse to them the loss, by reason of their own culpability in signing the check in such an improper form.<sup>14</sup>

<sup>11</sup> *Merchants' Bank of New York v. Exchange Bank of New Orleans*, 16 La. 457.

<sup>12</sup> *Wade v. Withington*, 1 Allen (Mass.) 561; *Mahaiwe Bank v. Douglass*, 31 Conn. 170; *Hall v. Fuller*, 5 Barn. & Cr. 750; *Robarts v. Tucker*, 16 Q. B. 560. Practically to the same effect are *Graves v. American Exchange Bank*, 17 N. Y. 208; *Mead v. Young*, 4 T. R. 28, wherein the discovery of the forgery would have been very difficult indeed, and no reason for suspecting it was apparent or existed.

<sup>13</sup> *Bank of Commerce v. Union Bank*, 3 N. Y. 230; and see *Merchants' Bank of New York v. Exchange Bank of New Orleans*, 16 La. 457.

<sup>14</sup> *Whitmore v. Wilks*, 3 C. & P. 364.

§ 481. **Alteration of Certified Check after Certification.** — The same rule has been extended to apply to checks altered after they have been certified. The reason is less strong, yet it seems to be the law that the bank is not bound to an accurate knowledge of its own obligation. Therefore, if a bank officer certifies a check, and it is thereafter and before presentment for payment altered so as to call for a larger sum, and the bank afterward, through mistake, pays the larger sum, it may recover back from the payee the difference between the original and the increased sums. Some English authorities would seem to entitle the bank to recover back the whole sum; for the alteration in the check in a material part vitiates it altogether and makes it a void instrument, so that any payment at all upon it might be considered unlawful.<sup>1</sup> But the precise question has arisen and been disposed of in New York, in a case substantially as follows.<sup>2</sup>

*The Excess may be Recovered, unless an Innocent Party would be Prejudiced by the Bank's Negligence and the Recovery*

(a) On February 15, V. & Co. gave to G. their check for \$56.75, which G. had duly certified by the bank on which it was drawn; after certification it was fraudulently altered so as to bear date a day later, and to read for a much larger amount. G. then deposited it in his bank, and obtained credit for the false amount. The check went through the clearing-house, and was duly allowed by the bank on which it was drawn. It was not until the first of the following month that, in ordinary course of business, V. & Co. discovered the forgery, and notice was immediately given. Suit was brought by the bank on which the check had been drawn against the bank which had presented it at the clearing-house, to recover the amount paid by mistake. The points raised, and the disposition made of them will be best gathered from the language of the opinion, delivered by Rapallo, J. After citing and commenting upon the various cases, he makes special reference to the opinion of Judge Story in *Bank of the United States v. Bank of Georgia*, as follows: —

<sup>1</sup> § 481. *Master v. Miller*, 4 T. R. 320; *Taylor v. Mosely*, 6 C. & P. 273; and see *Langton v. Lazarus*, 5 M. & W. 629; *Henman v. Dickinson*, 5 Bing. 183.

<sup>2</sup> *National Bank of Commerce v. National Mechanics' Banking Association*, 55 N. Y. 211. See *Continental National Bank v. Metropolitan National Bank*, 107 Ill. App. 455 (1903).



“But giving to that decision, for present purposes, its largest scope, it goes no farther than to hold that, in case of an alteration in the body of an instrument, the recognition of the altered instrument as genuine is binding upon the party who made the body as well as the signatures. And the distinguishing feature of all the cases is, that the forgery ought to have been detected by a bare inspection of the instrument itself, without the necessity of reference to books, or anything outside of the document presented, even the memory of the party as to the written obligations which he has issued.”

He then continues: “In the present case it is contended that, when the check for fifty-six dollars was certified by the Bank of Commerce, such certification made it an obligation of that bank; that, when subsequently presented to the bank in its altered condition as a check for \$15,006, the bank was bound to know its own obligation, and to detect the forgery; and that the bank, by recognizing it as genuine, and acquiescing in the payment through the clearing-house, precluded itself from afterward setting up its own mistake. On general principles, mere negligence in making the mistake is not, as has been already shown, sufficient to preclude the party making it from demanding its correction.

(b) “Such negligence does not give to the party receiving the payment the right to retain what was not due, unless he has been misled and prejudiced by the mistake. If his loss had been incurred and become complete before the payment, he should not, in justice, be permitted to avail himself of the mistake of the other party to shift the loss upon the latter. To render it compulsory upon the courts to refuse a correction of the mistake, the facts of the case must bring it within the excepted ones before referred to. This the facts of the present case fail to do. The essential element is wanting, that the body of the instrument as well as the certification was the work of the bank, and that therefore it was conclusively presumed to know by a mere inspection of the instrument whether or not it had been altered. The bank was not bound to know the handwriting or genuineness of the filling up of the check. It was legally concluded only as to the signature of the drawer and its own certification. The rules of law in relation to the correction of mistakes of fact have been gradually growing more liberal, and are moulded so as to do equity between the parties. The exceptions which have been established by authority, and have been engrafted upon the commercial law, it is not our purpose to

disturb, but they should not be extended; unless a case is clearly brought within them, the general principles should govern. No case has been cited, nor do I think any can be found, which holds that a payment by mistake, such as is shown in the present case, cannot be recovered back. If the defendant had shown that it had suffered loss in consequence of the mistake committed by the plaintiff, — as, for instance, if, in consequence of the recognition by the plaintiff of the check in question, the defendant had paid out money to its fraudulent depositor, — then, clearly, to the extent of the loss thus sustained the plaintiff should be responsible. But it appears that all the money which Greenleaf, the fraudulent depositor, obtained from the Mechanics' Banking Association, on the credit of the altered check, was paid out on the 16th of February, the day before the check was presented to the plaintiff. On the 16th, Greenleaf drew out of the Mechanics' Banking Association a larger amount of money than that for which it had given him credit on the faith of the altered check, and he drew none afterward. The recognition of this check by the plaintiff on the 17th of February could not have had any influence upon the action of the Mechanics' Banking Association in paying Greenleaf's drafts on the 16th. The loss occasioned by those payments had been fully incurred by the Mechanics' Banking Association before the plaintiff had made the mistake which it seeks in this action to have corrected. Such being the case, there is no equity in the claim of the Mechanics' Banking Association to retain the money which it obtained from the plaintiff through mistake, and thus to shift the loss which it had sustained, through the fraud of its own customer, from itself to the plaintiff. Neither do we find anything in the conduct of the plaintiff, after the payment of the check, which should preclude it from reclaiming the money which it has paid. Delay in discovering and giving notice of the mistake is complained of; but the evidence shows that notice was given immediately on the discovery of the mistake, and it fails to show that, by the failure to receive earlier notice, any damage was sustained by the defendant. All the judges of the court below are agreed upon this branch of the case, notwithstanding their division upon the principal question."<sup>3</sup>

The judgment for the amount of the altered check, less the

<sup>3</sup> *National Bank of Commerce v. National Mechanics' Banking Association*, 55 N. Y. 211.

amount of the original check, which had been rendered by the lower court, was affirmed, all the judges concurring.

(c) When a bank certifies as good a check on it to the order of a certain payee, and the check is subsequently altered by the drawer so as to make it payable to bearer, and thus altered is paid by the bank to some unknown party before the original payee is advised of the certification, and before any third party has acquired any interest in the check, the bank cannot be held for any loss to others caused by paying the check, because of an agreement between those others and the drawer, to which the bank was not privy.<sup>4</sup>

*Negligence of Bank Leaving Open the Way to Forgery*

(d) But when a bank certifies a check so drawn as to admit of easy alteration, it is liable to a *bona fide* holder for value for the whole amount of the check, excess and all.

§ 482. **Alteration of Check before Certification.** — *Certification only warrants drawer's signature and funds; and any excess paid on a raised check may be recovered.* — The better doctrine seems to be that certification of a check by a bank is a voucher on the part of the bank only for the facts that the signature is genuine, and that there are funds enough to pay the amount for which the check purports to be drawn; that the bank does not warrant the genuineness of the body of the check, or of any indorsement upon it; and that if there has been any fraudulent alteration or forged indorsement prior to certification, the certification, like the payment, is made under a mistake of facts; and as the payment could be recovered back, so the certification is not binding. An elaborate and conclusive opinion by Allen, J., in 1874, determines this point very satisfactorily. The case was as follows.<sup>1</sup> A depositor in the plaintiff bank drew upon it his check for \$25, payable to the order of H. S. The check was offered by a stranger to D. & Co. in payment for gold, which it was proposed to purchase from them, and the name of the drawer of the check was given to D. & Co. as that of the purchaser of the gold. But before the check was actually shown to D. & Co. it had been so altered as to call for a much larger sum, and to be payable to the order of

<sup>4</sup> *Abrams v. Union National Bank*, 31 La. An. 61.

<sup>1</sup> § 482. *Marine National Bank v. National City Bank*, 59 N. Y. 67 (1874).

D. & Co. Before completing the transaction by delivery of the gold, D. & Co. sent the check to the plaintiff bank, and had it duly certified. The gold was then delivered. D. & Co. deposited the check to their credit in the defendant bank, and it was paid in due course of business by the plaintiff. A suit to recover the amount was determined in favor of the plaintiff. The points made in the decision were, that the certification was indeed the engagement of the bank that the signature was genuine, and so in fact it was; that the drawer had standing to his credit the amount drawn for, and so in fact he had; and that this amount should "not be withdrawn from the bank by the drawer of the check", and in fact this amount had not been so withdrawn by the drawer of the check. The plaintiff bank, therefore, had fulfilled all the obligations under which the act of certification had placed it.

*Any Representations as to Body of Check are beyond Authority*

(a) To the same purport is another New York case, recently determined. The messenger who brought the check, in this instance, showed it to the teller, remarking that the senders did not like the looks of the person who offered it, and wished to be sure that it was right "in every particular." The teller examined it, certified it, and assured the messenger that it was right in every particular. The court lay down the law as in the foregoing case; and add, that the bank was not estopped by the assertions of the teller to show a forgery in the body of the check before certification; for that any representations made by him as to anything except the genuineness of the drawer's signature [and doubtless it should have been added, the sufficiency of funds] were unauthorized, and not binding on the plaintiff.<sup>2</sup> Evidence that it was the custom of banks and merchants to understand certification as warranting the whole check was rejected.

(b) The point has come up also in the Supreme Court of the United States, though not in such shape as to cover the whole ground quite so conclusively as does the foregoing New York case. A genuine check was altered so as to read for a larger sum and to a different payee; to this payee it was offered by a stranger; the payee, before taking it, sent it to the bank on which it was drawn to in-

<sup>2</sup> Security Bank of New York v. National Bank of the Republic, 67 N. Y. 458.

quire whether it was good. The teller looked at it, and at the drawer's account, and said, "It is good [or, It is all right]; send it through the clearing-house." The payee received payment in due course, through the clearing-house, the next day. When the fraudulent alteration was discovered, the paying bank sued to recover the amount from the payee. The court expressed much reluctance to treat the remark of the teller as creating an acceptance of the check; but held that, even if this point should be conceded, yet it would not follow that the bank should be considered to have guaranteed the genuineness of the instrument, in any particular, save as to the drawer's signature, and the fact that the drawer had sufficient funds to his credit to meet the draft. Whether, if the bank had certified the check in writing, and so sent it forth to circulate as money, to have the effect of a certificate of deposit, or an accepted bill of exchange, the bank might not be held to guarantee the entire instrument, was a question as to which the court expressed much doubt, carefully distinguishing it from the question actually before them for determination upon the special facts of the case. The information was sought by the payee simply in order that he might govern his own action thereby, not in order that he might be enabled to put the paper upon the market. The teller, not having his attention directed to any of those parts or features of the instrument with which he could not be supposed to be peculiarly conversant, was entitled to suppose that he was to answer only as to the facts with which he was peculiarly conversant; viz., the drawer's signature, and the sufficiency of the drawer's account. He had no reason to suppose that the payee was asking whether or not the payee's own name was fraudulently written. But had he had his attention in any way called to the whole instrument, a different question would have arisen. It may be doubted whether it is within the function of the teller or cashier to bind the bank by a guaranty as to any fact concerning the check, save only the two special facts concerning which it is his business to have and to impart information.<sup>3</sup>

"Where money is paid on a raised check by mistake, neither party being in fault, the general rule is, that it may be recovered as paid without consideration; but if either party has been guilty of negligence or carelessness by which the other has been injured, the negligence party must bear the loss."<sup>3</sup>

<sup>3</sup> *Espy v. Bank of Cincinnati*, 18 Wall. 604, 21 L. ed. 947 (1873); *Helwege v. Hibernia National Bank*, 28 La. Ann. 520 (1876).

(c) A check being brought to H. for discount, was taken to the cashier by H. to know if it was good and would be paid. The cashier said it was good. H. paid money for the check, presented it next day, and received the cash. The check had been raised before it was taken to H. in the first place. Neither H. nor the bank knew this fact. The bank recovered the money as paid by mistake; the representation could have no more effect than certification, and certification only warrants the signature of the drawer and the sufficiency of funds.<sup>4</sup>

(d) Where a check, after leaving the drawer's hands, was raised by some person not authorized to do so, and was subsequently certified by the bank, the court held that the bank had not bound itself to pay the amount of the altered check, and that, having made the payment, it might recover back the amount.<sup>5</sup> And the fact that the holder had sent the check in its raised state to the bank, inquiring if the certification was good, and that the teller replied that it was, did not make the bank liable. The bank was bound not to do anything intentionally or carelessly that would mislead the holder, or upon which he might properly rely to his damage; but the attention of the teller was not called to the body of the check; there was no inquiry as to whether it was in the same condition as when certified, but only if the certification was good, and the effect was the same as that of an original certification.

(e) Upon appeal it was held that the plaintiff had a right to go to the jury on the question whether it was culpable negligence in the teller to answer that the certificate was good, without comparing the draft with his certification-book and book of stopped payments, and whether the question to the teller was understood by the parties to refer to the validity of the certification, or simply to the genuineness of the marks of certification.<sup>6</sup>

(f) But in Louisiana, where a check was certified after it had been raised, and was afterward paid by the certifying bank, it was held that the latter could not recover the money thus paid upon its certification.<sup>7</sup> The holder took on faith of the certification, and the court said that, as one of two innocent parties must bear the loss, it should be the one whose act caused the loss, and

<sup>4</sup> *Parke v. Roser*, 67 Ind. 503 (1879).

<sup>5</sup> *Clews v. Bank of New York National Banking Association*, 89 N. Y. 418 (reversing decision in 8 Daly 476).

<sup>6</sup> *Ibid.*, 105 N. Y. 398, 11 N. E. 814 (1887).

<sup>7</sup> *Louisiana National Bank v. Citizens' Bank of Louisiana*, 28 La. Ann. 189 (1876).

endeavored to distinguish the Espy case by saying that the certification was only verbal in that case. It seems to us to be a question properly to be decided by the understanding of business men and banks as to the meaning of certification. It is established that it warrants the drawer's signature and funds; so far the taker has a right to rely upon a certification, but beyond that no holder has a right to rely unless a further meaning is given the act by usage or agreement, and until this is proved courts should not enlarge the contract or increase the burden of the bank. As to facts beyond the two named, both parties are equally bound to inquire.

§ 483. A bank issued a draft for \$500; the purchaser (B.) in Texas sent it to New York, where it was paid, having been raised to \$5000. *Held*, the Texas bank could not recover the amount of the purchaser.<sup>1</sup> This case raises no question in the mind of the reader except as to the sanity of a bank that could expect to recover from B. for the raising of a draft after it left his hands.

§ 484. **Alteration in printed Part of Check.**—In *Mahaiwe Bank v. Douglass*,<sup>1</sup> it was claimed that it was customary for banks to discount paper written on printed blanks, where the printed matter, or some part of it, had been erased or lined out, and that such erasure or striking out did not cast suspicion on the paper, or put the bank upon inquiry. The court declined to adopt this doctrine, saying: "It would be an innovation upon the system of mercantile law, equally impolitic and unsupported by authority, to hold that any and every part of a bill or note may appear to be erased, and other words written upon the erasure, or in the place of the words erased, without putting the party to whom such paper is offered upon inquiry, merely because the words erased were printed, instead of written with a pen. Such custom, we are persuaded, has not yet existed so long or become so general as to make it part of the law merchant. . . . It seems more in accordance with principle and reason to hold that the effect of apparent erasures and alterations in exciting distrust and putting upon inquiry depends more upon the significance and importance of the words erased, than upon the way in which they were first impressed upon the paper; and such, we are satisfied, is the rule of law."

In *Re Nagle's Estate* <sup>2</sup> it was held that in the absence of evidence

<sup>1</sup> § 483. *City National Bank of Fort Worth v. Stout*, 61 Tex. 567.

<sup>1</sup> § 484. 31 Conn. 170, at p. 182.

<sup>2</sup> 134 Pa. St. 31, 19 Atl. 434.

to the contrary the maker of negotiable paper is presumed to have issued it clear of all blemishes, erasures and alterations; and the burden of showing that a blemished instrument was defective when issued is upon the holder, notwithstanding the presumption is in favor of innocence, or the fact that the original parties to the paper are dead.

§ 485. **Alteration must be Material.** — The alteration, to be entitled to any effect or consideration at all, must be in a material part of the instrument.<sup>1</sup> Whether or not the alteration is in a material part is a question “easily tested by inquiring whether the instrument would have the same legal effect and operation after the alteration as before it.”<sup>2</sup> If the analogy of the Rhode Island case cited may be trusted, an alteration of the figures upon the check to make them correspond to the written words would not be objectionable.

*Alteration in Date is Material*

One to whom a check had been intrusted by the payee to pay into a bank, absconded, and after altering the date from March 2 to March 26, transferred it to V. for value. The check was not paid, payment having been countermanded by the drawer. In an action by V. against the drawer, *held*, that the alteration was material, and invalidated the check; and that the fact was immaterial, that V. had been guilty of no negligence in taking it.<sup>3</sup>

*Alteration in Figure does not Vitate*

No alteration (even though fraudulent and unauthorized) of the marginal figures can vitiate the bill, as a bill for the full amount inserted in the body, when it reaches the hands of a holder for value who is unaware that the marginal figures have been improperly altered.<sup>4</sup> No injury is done, for the writing controls the figures. Alteration of figures in the margin does not avoid,<sup>5</sup> but addition of place of payment does, as to parties not consenting.<sup>6</sup>

<sup>1</sup> § 485. *Mahaiwe Bank v. Douglass*, 31 Conn. 170, at p. 181; *Smith v. Smith*, 1 R. I. 398; *Gardner v. Walsh*, 32 Eng. L. & Eq. 162.

<sup>2</sup> *Wheelock v. Freeman*, 13 Pick. (Mass.) 165 (1832).

<sup>3</sup> *Vance v. Lowther*, 1 Ex. D. 176 (1876).

<sup>4</sup> *Garrard v. Lewis*, 10 Q. B. D. 30 (1882).

<sup>5</sup> *Woolfolk v. Bank of America*, 10 Bush (Ky.) 504 (1874). See *Leas v. Walls*, 101 Pa. St. 57, where 8 in the margin was changed to 80, and “eight” to “eighty,” space being carelessly left.

<sup>6</sup> *Whitesides v. Northern Bank*, 10 Bush (Ky.) 501 (1874).



Alteration of a check after indorsement (by inserting a date of payment or otherwise) presumptively vitiates the paper as to the indorser, and the burden is on the party seeking to recover on the instrument to relieve it from the effect of the alteration which may be done by showing that the changes were made by a stranger to the check.<sup>6a</sup>

**Erasing and Rewriting is Forgery,**<sup>6b</sup> though the same name be written as was originally on the paper.

A somewhat singular occurrence, perhaps not likely to be duplicated, arose in the case of the *National Park Bank v. Ninth National Bank*.<sup>7</sup> A genuine check or draft was drawn payable to the order of E. S., and signed by W. R. as cashier. The name of the payee, the amount, and the signature were all erased; a larger amount and the name of a different payee were written, and the name of the same cashier was *rewritten*. The court (Allen, J.), commenting upon these circumstances, say: "The fact that a genuine check had been drawn, and signed by the proper party upon the same piece of paper, does not affect the character of the instrument in its altered and forged condition. The forger, by skilfully obliterating the genuine signature, together with the words and figures indicating the amount payable thereon, effectually destroyed the instrument; and it was incapable of being restored to its original condition in the form of a check, and made available for any purpose. It was but a blank form of a draft or bill; and the act of signing the name of the cashier as drawer, with intent to utter and pass the same as genuine, was a crime, and the signature a forgery, whether the check was for the same or a different amount from that for which the original and genuine bill had been drawn. Whether the forger used the same paper on which the original instrument had been written and signed, and manipulated to serve his purposes, or made and forged a check on another and different piece of paper, is not material, so long as the signature of the drawer was counterfeit. The drafts paid by the plaintiff were not merely raised checks, that is, forged and altered by the obliteration and removal of one sum and the insertion of another, but were forged instruments in every sense."

<sup>6a</sup> *National Ulster Co. Bank v. Madden*, 114 N. Y. 280, 21 N. E. 480.

<sup>6b</sup> *Ex parte De Baun*, 4 Montreal L. R. (Q. B.) 145; *Union Biscuit Co. v. Springfield Grocer Co.*, 143 Mo. App. 300, 126 S. W. 996 (1910). See *Otis Elevator Co. v. First National Bank*, 163 Cal. 31, 124 Pac. 704, 41 L. R. A. (N. S.) 529, n. (1912).

<sup>7</sup> 46 N. Y. 77.

§ 486. **Checks Signed in Blank and Fraudulently filled up.** — I have found no case in which a check signed in blank by the depositor has been subsequently filled up fraudulently, and question has been made as to who should bear the loss. Reason and principle must, however, be taken to make it plain that whosoever runs the risk inevitably attendant upon executing such an instrument in blank shall be held to bear any loss arising therefrom. There are authorities which, by analogy, sufficiently support this doctrine. For instance, in the case of *Russell v. Langstaffe*,<sup>1</sup> defendant had indorsed certain blank notes or checks. Lord Mansfield said: "The indorsement on a blank note is a letter of credit for an indefinite sum." In an early case in Massachusetts, *Parsons, C. J.*, held that the partnership which had left certain notes signed and indorsed in the firm name and in blank was liable to pay to a *bona fide* holder for value the amount which had fraudulently been filled in.<sup>2</sup> It has been held in Connecticut, that, though the party to whom the check or note is intrusted, signed in blank, may have power to *fill it up* as he pleases, yet he has no power to *alter* any portion of it which is complete when he receives it. Such alteration avoids the paper, puts the bank on its inquiry, and consequently will leave the bank to bear the loss, if it pays when it should not.<sup>3</sup>

The Port Richmond Pottery Co. being indebted to S. W. & Co., a note in blank was indorsed by the president of the corporation, "G. S. B., Pres't." The amount was afterward filled in, the note made payable to the order of G. S. B., and the abbreviation "Pres't" was erased fraudulently; and in this condition the note was handed to S. W. & Co. It appeared that S. W. & Co. had knowledge that G. S. B. was president of the company. The court said that S. W. & Co., having this knowledge, would have been unable to hold the indorser as an individual, had the erased word still been upon the note when they took it. The erasure was therefore a material alteration. But S. W. & Co., having taken the note for an antecedent debt and surrendered no security, were not holders for value, and consequently could not recover against G. S. B. individually.<sup>4</sup>

<sup>1</sup> § 486. 2 Dougl. 514. The same general rule is admitted, though the cases are not decided under it, in *Lancaster National Bank v. Taylor*, 100 Mass. 18; *Whistler v. Forster*, 14 C. B. n. s. 248.

<sup>2</sup> *Putnam v. Sullivan*, 4 Mass. 45.

<sup>3</sup> *Mahaiwe Bank v. Douglass*, 31 Conn. 170, at p. 181.

<sup>4</sup> *Sharpe v. Bellis*, 61 Pa. St. 69 (1869).

But when an instrument signed in blank, and which has been fraudulently filled up for an amount in excess of that authorized by the signer, is made payable to the order of any person, it must be duly indorsed by such payee before maturity and before the *bona fide* taker or holder has any knowledge of the fraud. Where such an instrument is, through neglect or any other reason, transferred without the indorsement, and the indorsement is put upon it subsequently after maturity of the paper, or after the holder has some knowledge concerning the fraud, the paper will be subject to all defences which could have been set up by the original signer in a suit brought against him by the original payee, although the actual transfer was made *bona fide* for value, and before maturity.<sup>5</sup>

Where the cashier of a bank drew drafts in blank and left them with a clerk to be filled out and he filled them out fraudulently and used them in his own business and thus perpetrated a fraud against the drawer, the burden is upon the holder to show that he took them without notice of the fraud.<sup>6</sup>

When the officers of a bank knew that the drawer's agent had authority to fill out and cash checks, though he had no authority to sign them, the bank is not liable for paying a check the amount of which appears, by the agent's handwriting, to have been changed.<sup>7</sup>

§ 487. **Within what Time Notice of Forgery must be given.** — More than forty-three,<sup>0</sup> thirty,<sup>00</sup> fifteen,<sup>1</sup> fourteen,<sup>2</sup> seven<sup>3</sup> days', and even one<sup>4</sup> day's delay, after payment on forged indorsement or signature, has been held fatal. But as we shall see, the best opinion is that no lapse of time is sufficient to bar recovery if the defendant will be no worse off by the correction of the mistake than he would have been if payment had been refused,<sup>4a</sup> and provided notice is promptly given on discovery of the fraud. And

<sup>5</sup> Lancaster National Bank v. Taylor, 100 Mass. 18; Whistler v. Forster, 14 C. B. N. s. 218.

<sup>6</sup> Clifford Banking Company v. Donovan Commercial Co., 195 Mo. 262, 94 S. W. 527 (1906).

<sup>7</sup> Champion Ice etc. Co. v. American Bonding etc. Co., 115 Ky. 863, 75 S. W. 196, 103 Am. St. Rep. 356 (1903).

<sup>0</sup> § 487. Connors v. Old Forge etc. Bank, 245 Pa. St. 97, 91 Atl. 210 (1914).

<sup>00</sup> United States v. National Exchange Bank, 45 Fed. 163.

<sup>1</sup> Gloucester Bank v. Salem Bank, 17 Mass. 35.

<sup>2</sup> Davies v. Watson, 2 Nev. & M. 709.

<sup>3</sup> Smith v. Mercer, 6 Taunt. 76.

<sup>4</sup> Cocks v. Masterman, 9 Barn. & Cr. 902; 17 E. C. L. R. 517.

<sup>4a</sup> Harlem v. Mercantile Trust Co., 64 N. Y. 494; Pratt v. Union National Bank, 79 N. J. L. 117, 75 Atl. 313 (1909).

the mere fact that the usual time for notifying the person who indorsed the paper to the defendant has passed, is of no moment, for the indorser or transferrer warrants the genuineness of the paper, and if it is a forgery he is entitled to no notice of dishonor,<sup>5</sup> and the remedy over against him is good. And where the payee is in fault equally with the payer, or to a greater degree, even though the lapse of time between payment and discovery may have resulted in loss to the payee, the payer may still recover; the loss is the payee's own fault.

Where upon discovery of a forgery the bank is notified at once that it will be held responsible, it is not necessary to tender the check immediately; tender within a reasonable time is sufficient.<sup>6</sup>

§ 488. **The Old Cases.** — *Bank must discover in time to save payee's rights by giving regular notice of dishonor.* — Where the bank seeks to recover from the payee, it was formerly held rigorously to make the discovery of the forgery, and to give notice of it to the holder with great promptitude, — though mere promptitude cannot alone create the right to recover, as has been already seen.<sup>1</sup> This rule, laid down in nearly all the cases cited in the foregoing pages, is perhaps infringed by *Bank of North America v. Bangs* (*supra*), where the lapse of twelve days did not deprive the plaintiff of the right to recover; and that, too, although, had notification been made at once, the defendants might possibly have remembered from whom they had received the check, and have had some chance to recover the amount; whereas, when notification was given them they had wholly forgotten the circumstances. It is also at the least a very strong point, and probably an absolutely essential one, that in the interval between the presentment and payment, and the notification to the payee, he should have been deprived of no legal rights, and should have lost no practical opportunity, or even possible chance, of saving himself from loss upon the paper.<sup>2</sup> In the case of *Wilkinson v. Johnson*,<sup>3</sup> it will be remembered, the payment and the return of the forged

<sup>5</sup> Pars. N. & B. 560; *Turnbull v. Bowyer*, 40 N. Y. 456 (1869). See the same principle, *Burrill v. Smith*, 7 Pick. (Mass.) 291. See, also, *Daniel* on Neg. Inst., § 1371.

<sup>6</sup> *Brixen v. National Bank*, 5 Utah 504, 18 Pac. 43.

<sup>1</sup> § 488. *Levy v. Bank of United States*, 4 Dall. 234, 1 L. ed. 814.

<sup>2</sup> *Wilkinson v. Johnson*, *supra*; *Smith v. Mercer*, 6 Taunt. 76; *Cocks v. Masterman*, 9 Barn. & Cr. 902; *Price v. Neal*, 3 Burr. 1354; *Smith v. Chester*, 1 T. R. 654; 1 D. & E. 655. The dissenting opinion of Ruggles, J., in *Goddard v. Merchants' Bank*, 4 N. Y. 147.

<sup>3</sup> 3 Barn. & Cr. 428.

paper were both made within business hours of the same day, and the court dwelt with emphasis upon this, and upon the consequent fact that the payees had lost none of their remedies against indorsers or others. The case of *Cocks v. Masterman* <sup>4</sup> is commonly regarded as a leading authority on the subject of the time within which discovery must be made and notice given.

*The Day after Maturity Held too Late. Seven Days too Late*

There the bill forged was returned on the day following that of the payment upon it. The court said: "We are all of opinion that the holder of a bill is entitled to know on the day when it becomes due whether it is an honored or dishonored bill, and if he retain the money, and is suffered to retain it the whole of that day", the payers cannot afterwards recover it back. For the holder, though not bound to notify the drawer and indorsers till the day after the dishonor, is yet entitled to do so, if he sees fit; and the payers ought not by their negligence to be allowed to deprive the holder of the right of proceeding on the first day if he so chooses. In the opinion delivered in the case of the *Canal Bank v. Bank of Albany*,<sup>5</sup> and also in the dissenting opinion of Ruggles, J., in the case of *Goddard v. Merchants' Bank*,<sup>6</sup> this ruling in *Cocks v. Masterman* is criticised as too severe. The court, in delivering this opinion, take pains to prevent its being construed, by inference or otherwise, to pass as an authority for more than the simple ruling that a notice and return on the day following that of the payment on a forged bill is too late. They expressly decline to give an opinion whether the plaintiffs could have recovered if notice had been given on the same day." In *Smith v. Mercer*,<sup>7</sup> the drawee's acceptance of a draft, payable at his banker's, was forged. The banker paid it, and discovered the forgery only after the lapse of seven days. In a suit to recover the money, as having been paid under mistake, judgment was rendered for the defendant. Some of the judges laid great stress upon the fact that the defendant had lost his remedy against indorsers before he had notice of the forgery. Dallas, J., said: "Suppose Smith & Co. had not paid it, it would have been immediately returned, and it might have been recovered or put in suit. But the effect of the delay has been to give him an extended credit; and how am I able to say that

<sup>4</sup> 9 Barn. & Cr. 902.

<sup>5</sup> 4 N. Y. 147.

<sup>6</sup> 1 Hill (N. Y.) 287.

<sup>7</sup> 6 Taunt. 76.

his situation in the intermediate time may not have undergone such a change as to render him incapable of paying what he could have paid upon proper notice and demand? The ground, therefore, upon which I rest my opinion, and to which I wish to confine it, is the want of due caution in having paid the bill, the effect of which has been to give time to different parties, which the plaintiffs were not authorized to do."

Other cases say, in somewhat indefinite language, that the discovery and notice must be "immediate."

### *Two Months no Recovery*

In Vermont a case <sup>8</sup> arose wherein a check, payable to J. W. or bearer, was purchased by a bank from J. W., and was indorsed over by him to the bank. The purchasing bank forwarded it to the bank on which it was drawn, and received credit for it on an account which was kept between the two banks. It was held that the lapse of two months, occurring before the drawee bank discovered the forgery and notified it to the purchasing bank, would prevent the drawee from recovering the amount. For in the interval it was impossible to say what remedies might have become unavailing to the purchasing bank, which, at an earlier date, it might have had. It had certainly lost the opportunity to give immediate notice to the indorser, J. W., and even if it could be shown that he was aware that the maker's signature was forged, so that notice might be dispensed with, yet other remedies might have been lost. The court could not "pronounce judicially that the defendants could, at a future day, command the same facilities for redress which existed when the check was first presented." The court of Massachusetts <sup>9</sup> appears to have felt no scruples about extending its judicial knowledge beyond the limits established by the court of Vermont.

### *Clearing-house Rules*

An effort has been made, though ineffectually, to limit the right of the bank which has made the erroneous payment, as to the time within which it must return the check, by means of the rules of the clearing-house association. The question did not arise at first

<sup>8</sup> Bank of St. Albans v. Farmers & Mechanics' Bank, 10 Vt. 141.

<sup>9</sup> National Bank of North America v. Bangs, 106 Mass. 441.

concerning a forged check,<sup>10</sup> but the principle evidently covered that case, and was subsequently expressly declared to do so.<sup>11</sup> The rule of the association gives to the drawee bank until one o'clock to make return of any check which has been put into it through the clearing-house and which is not good; and it is declared that in no case shall checks which are not good be retained after that hour. The court say, that until one o'clock the payment of the check is only provisional; that at one o'clock, the check not having been returned, the payment becomes complete. But it is then simply *a payment*; the rights of the parties are precisely the same as if the payment had been made at that hour over the counter; and these rights are not reached or affected by the clearing-house by-law.

§ 489. **The Better and Later Doctrine.** — The plaintiff not being in fault in not sooner making discovery, no mere length of time will bar recovery of money paid on a forged indorsement, if upon discovery prompt notice is given.<sup>1</sup>

Where each party has equal chance of knowledge of the handwriting forged, no case demands more than reasonable diligence in giving notice after discovery.<sup>2</sup>

In Massachusetts the lapse of twelve days did not bar recovery by the bank, even in case of forgery of the drawer's signature.<sup>3</sup>

*Suit for Money Paid on Forged Indorsement not Barred for Six Years at Least*

(a) A United States postmaster gave B.'s attorney (A.) a draft payable to B. A. forged B.'s indorsement, and got the money. The National Bank of R., on which the draft was drawn, paid it to the Bank of A., which had cashed it. *Three years* after, the forgery was discovered in the Treasury. Six days after dis-

<sup>10</sup> Merchants' National Bank v. National Eagle Bank, 101 Mass. 281.

<sup>11</sup> National Bank of North America v. Bangs, 106 Mass. 441.

<sup>1</sup> § 489. Star Fire Ins. Co. v. New Hampshire National Bank, 60 N. H. 442. In New Jersey and New York no action can be brought unless the bank has been notified of the forgery within one year after the return of the vouchers of payment. Pratt v. Union National Bank, 79 N. J. L. 117, 75 Atl. 313 (1909); Shattuck v. Guardian Trust Co., 145 App. Div. 734 (1911), 130 N. Y. S. 658. The statute must be pleaded in order to be available. Cases *supra*.

<sup>2</sup> Schroeder v. Harvey, 75 Ill. 638 (1874); citing Canal Bank v. Bank of Albany, 1 Hill (N. Y.) 287; Magee v. Carmack, 13 Ill. 289; Union National Bank v. Baldenwick, 45 Ill. 375 (1867).

<sup>3</sup> National Bank of North America v. Bangs, 106 Mass. 441.

covery, the United States notified the bank of it, and in nine days furnished the proofs. *Held*, "that the payment of a forged check gives no right of action *on the paper itself*, against any party to it; as in the case of a bill or note or check which had been dishonored, the party paying can only sue the party paid for money had and received, leaving it to the latter to sue in the same manner his immediate predecessor in the transaction; and as the defendant bank had not been deprived of its recourse against the only party it could have sued, viz., the Bank of A., there being still three years left, under the Statute of Limitations of New York, after it received notice of the forgery, in which it could have brought suit, no such laches had been shown on the part of the United States as would disentitle it to recover."<sup>4</sup>

(b) A bank, having paid money to B. on a check, discovered next day that it was a forgery, and that day or the one following notified B. *Held*, that the paying bank could recover. "The payer must be allowed a reasonable time to detect the forgery and demand restitution." What is reasonable depends "on the circumstances of each case." At all events, "it is not necessarily the day of payment nor the day after." "Where no negligence is imputable to the drawee in failing to detect the forgery, want of notice within the time which ordinarily charges previous parties on negotiable paper is excused, provided it be given to the holder as soon as the forgery is discovered."<sup>5</sup>

When money is paid on a forgery, and the parties are in mutual fault, it can always be recovered.<sup>6</sup>

(c) Return on Tuesday of a forged check, which had been presented through the clearing-house on Monday, has been held sufficiently prompt; although the depositor had already, on Monday, drawn against this deposit.<sup>7</sup>

### *Seventeen Days not too Long a Delay*

(d) In the case of an indorsement forged upon a draft, it was held, in a suit brought by the bank which had paid the draft

<sup>4</sup> *United States v. National Bank of the Republic*, 2 Mackey 289 (1883).

<sup>5</sup> *City Bank v. First National Bank*, 45 Tex. 203; *Third National Bank v. Allen*, 59 Mo. 310; *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.) 287.

<sup>6</sup> *Redington v. Woods*, 45 Cal. 406 (1873).

<sup>7</sup> *Corn Exchange National Bank v. National Bank of the Republic*, 78 Pa. St. 233 (1875).



against the depositor of it, that discovery of the forgery was sufficiently prompt, though seventeen days elapsed between the deposit and the discovery.<sup>8</sup>

*Laches. Statute of Limitations. Promptness in Notice of Forgery is a Condition of Recovery*

(e) Even the United States Government must give prompt notice upon discovery of a forgery. No mere statute of limitations can bar the Government of the United States, whether it is named in the statute or not; and when the United States sues in its own courts such a statute is not within the Judiciary Act of 1879, making the laws of the States rules of decision in the courts of the United States in cases where they apply. No laches can be imputed to the Government, and no time runs against it.<sup>9</sup> But when the Government deals in commercial paper, it subjects itself to the rules governing such paper,<sup>10</sup> and as promptness in giving notice of a discovered forgery is a condition precedent to recovery,<sup>11</sup> the Government is as much bound to promptness in such case as an individual. It is not the case of a right fixed and existing barred by lapse of time, but a question of what is necessary in order that any right shall arise.<sup>12</sup>

<sup>8</sup> *Chambers v. Union National Bank*, 78 Pa. St. 205 (1875).

<sup>9</sup> *United States v. Thompson*, 98 U. S. 486, 25 L. ed. 194; *United States v. Kirkpatrick*, 9 Wheat. 720, 6 L. ed. 199; *United States v. First National Bank*, 82 Fed. 410.

<sup>10</sup> *Cooke v. United States*, 91 U. S. 389, 23 L. ed. 237 (1875); *United States v. National Bank*, 6 Fed. 134; *United States v. Clinton National Bank*, 28 Fed. 357.

<sup>11</sup> 2 Daniel on Neg. Inst., § 1371; 2 Pars. N. & B. 598.

<sup>12</sup> *Myer v. Hartranft*, 28 Fed. 358.

## CHAPTER XXXIV

### EFFECT OF A CHECK

A. AS AN ASSIGNMENT OF THE DEPOSIT. The best opinion is, that as

(1) BETWEEN THE BANK AND THE HOLDER,

A check is an assignment of the funds of the drawer to the amount of the check, which assignment is complete upon presentation of the check, and if the bank improperly refuses payment, <sup>430, 410,</sup> the holder may sue the bank. But a check is no assignment as to the bank till notice is given to it.<sup>414</sup>

This is the Illinois doctrine; but the U. S. Supreme Court, following New York, hold that the bank is answerable to the holder directly only when it has accepted <sup>403</sup> the check.

§ 498. (2) BETWEEN HOLDER AND CREDITORS OF DRAWEE BANK.

The holder has no preference, for the depositor himself would have none.

(3) BETWEEN HOLDER AND DRAWER.

A check in the hands of a *bona fide* holder for value (or one who can claim in the right of such a holder) is an assignment, *pro tanto*, of the deposit upon which it is drawn, as against the drawer and his creditors subsequently attaching; and in case of the drawer's insolvency before the check is paid, the holder recovers in full, in preference to the general creditors, so far as the deposit on which the check was drawn is traceable in the bank or in the estate. (If the drawer were guilty of fraud in giving the check, the payee could rescind and claim the consideration he gave, if he could identify it.) A larger number of cases hold this rule than the one above, but there is still conflict.

§§ 539-541.

B. EFFECT BETWEEN ONE HOLDER AND ANOTHER.

§ 497. If the same drawer issues a number of checks, the one first presented must be paid first; and a holder of a check, B., presented later than C., can find no fault with either bank, or the holder of the check C., drawn subsequently to B., but presented before B., thereby reducing the funds below the amount of B.

C. CONFLICT OF LAWS.

§ 542. The effect of a check is determined by the law of the place where payable, except that as against the drawer or his

## EFFECT OF A CHECK

assignee for creditors coming into possession of the deposit, the law of the State where the check is drawn and the drawer resides will control.

D. EFFECT OF A CHECK AS PAYMENT.

E. EFFECT AS A GIFT.

F. EFFECT AS EVIDENCE.

§ 552. Between drawer and payee.

*Prima facie*, a circulated or cancelled check is evidence of a debt and payment, but it may be shown to have been a loan.

§ 553. Between drawer and bank.

§ 554. G. CHECK AS A TESTAMENTARY DOCUMENT.

H. CONSIDERATION OF THE QUESTION OF ASSIGNMENT.

§ 492. Special facts, taking the question of a holder's right of action out of the region of doubt.

§ 493. The general problem. The weight of authority is with the first class of cases.

§ 494. The weight of reason is with the second class of cases.

§ 495. The middle ground. The third class of cases.

§ 496. Discussion of grounds of decision as to effect of check.

§ 497. Between one holder and another.

§ 498. Between holder and creditors of drawee bank.

§ 499. Between bank and holder.

§§ 500, 499, note 1. If A. pays money to B. for C., the latter may sue B.

§ 501. Between drawer and bank.

§ 502. Fallacy in the New York view. Causes of confusion.

§ 503. Built on cases aside from the point.

§ 504. Narrowness of view.

§ 505. Failure to draw the line at presentment.

Objections to the Illinois doctrine considered.

§ 506. Want of privity.

§ 507. Double action by drawer and holder against the bank.

§ 508. Uncertainty of payee, and amount of check at time of deposit.

§ 509. Countermand.

§ 510. Absence of words of transfer.

### REVIEW OF THE CASES.

I. Cases in which, by reason of special facts,

(1) The holder may sue drawee.

§ 511. (a) Designated fund.

(b) Bank charging the drawer.

(c) Words of transfer in check.

(d) Certification.

(e) Communicated promise of bank to pay before the holder took the check.

(g) Check for whole deposit.

(h) Death of Drawer. Equity will relieve against the bank.

(l) When bank knows money to be really that of the holder, though in the drawer's name.

(2) Holder cannot sue drawee.

(i) Check not against funds.

(j) Deposit consisting only of unpaid drafts.

(k) Drawee bank insolvent before paying of check. Holder no preference to general creditors of the bank.

(f) Check no effect on bank till notice.

§ 512. J. Cases in which the holder sued the bank, claiming that the latter was guilty of breach of trust.

In one at least of these (if not in both), it was clear that the bank was guilty of applying to its own claim on general balance a deposit specifically made to pay the holder, but on the ground of want of privity the holder's suit was dismissed.

K. Cases denying that a check-holder can sue the drawee bank, or that the check operates as an assignment, legal or equitable.

§§ 513, 514. U. S. § 515. Ala. § 516. Eng. § 517. Ind. § 518. La. § 519. Md. § 520. Mass. § 521. Mich. § 522. Mo. § 524. N. Y. § 525. N. J. § 526. Penn. § 527. Tenn.

L. Cases affirming the holder's right to sue the drawee bank, or announcing principles from which that ruling flows.

§ 528. U. S. § 529. Eng. § 530. Ill. § 531. Iowa. § 522. Ky. § 533. N. Y. § 534. Ohio. § 535. Penn. § 536. S. C. and La. § 537. Wis. § 538. Miscellaneous.

M. Authorities for holding that a check is at least an equitable assignment between drawer and payee.

§ 539. United States. § 541.

§ 540. Ohio.

### § 491. The Rights of a Check-holder. — The Chief Questions. —

(1) Is a check an assignment between the drawer and a *bona fide* holder for value, so that the latter will be preferred to the general creditors of the drawer in case of his insolvency before the check is cashed? (2) Is a check an assignment as to the bank, so that the holder can sue the bank for refusal to pay upon the presentation of the check? These are two of the most interesting questions of banking law. In many States have learning and eloquence been drawn up in battle array to decide the issue, and with sadly varying results.

§ 492. **Special Facts.** (See § 511.) — (a) There may exist special facts giving an equation easy of solution, as if the check is drawn on a designated fund, or is accepted by the bank, or if the bank charges the amount to the drawer, or settles with him on the basis of allowing for the check, or if the check contains words of absolute transfer, or if an assignment oral or written was really made aside from the check, or if it is drawn for the whole deposit, or if the bank makes an express promise to pay the check and the holder takes it on the faith of such promise, or if the money is deposited as the check-holder's so that it is his property from the start, or if, instead of a general deposit, the funds are deposited with the bank specifically, so that they are held in trust for the

holder, there is no doubt the bank can be held in an action by the holder, and in England equity gives relief in case of the death of the drawer.

(b) And, on the other hand, if a check is not drawn against funds, it is clear the holder has no right to sue the bank, and a check of which the bank has no notice cannot be allowed to affect it injuriously; the equity, if there is one, is secret as to the bank until notice.

§ 493. **The General Problem.** — But when we seek a solution of the general problem of the holder's rights in case of an ordinary check on sufficient funds, the above special facts being absent, authority is as divergent as the rays of the sun.

### *Weight of Authority*

The most numerous body of decisions sustains the view that a check is neither a legal nor an equitable assignment as between drawer and payee, nor a sufficient foundation for any action by the holder against the bank. The authorities<sup>1</sup> for this answer

<sup>1</sup> § 493. *U. S.* National Bank of the Republic *v.* Millard, 10 Wall. 152, 19 L. ed. 897 (1870); Christmas *v.* Russell, 14 Wall. 69, 20 L. ed. 762 (1871); Laclede Bank *v.* Schuler, 120 U. S. 511, 30 L. ed. 704, 7 Sup. Ct. 644; Essex County National Bank *v.* Bank of Montreal, 7 Biss. 193; Spain *v.* Hamilton's Administrator, 1 Wall. 604, 17 L. ed. 619; Marine Bank *v.* Fulton Bank, 2 Wall. 252, 17 L. ed. 785; First National Bank *v.* Whitman, 94 U. S. 343, 24 L. ed. 229 (1876); Rosenthal *v.* Mastin Bank, 17 Blatchf. 318; Florence Mining Co. *v.* Brown, 124 U. S. 385, 31 L. ed. 424, 8 Sup. Ct. 531; *In re Grive*, 151 Fed. 711 (1907); First National Bank *v.* Selden, 120 Fed. 212 (1903); Eastern Milling etc. Co. *v.* Eastern Milling etc. Co., 146 Fed. 761 (1906); Bowker *v.* Haight, 146 Fed. 257 (1906).

*Ala.* National Commercial Bank *v.* Miller, 77 Ala. 168; People's Sav. Bank etc. Co. *v.* Lacy, 146 Ala. 688, 40 So. 346 (1906).

*Ark.* Rogers Commn. Co. *v.* Farmers' Bank, 100 Ark. 537, 140 S. W. 992 (1911).

*Cal.* Le Breton *v.* Stanley Contracting Co., 15 Cal. App. 429, 114 Pac. 1028 (1911); John M. C. Marble Co. *v.* Merchants' National Bank, 15 Cal. App. 347, 115 Pac. 59 (1911).

*Col.* Boettcher *v.* Colorado National Bank, 15 Colo. 16, 24 Pac. 582; Van Buskirk *v.* State Bank, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182 (1905).

*Eng.* Hopkinson *v.* Forster, L. R. 19 Eq. 74 (1874). See Grant on Banking, 4th ed., p. 87, and Bellamy *v.* Majoribanks, 8 Eng. L. & Eq. 523; Williams *v.* Everett, 14 East. 582; Stewart *v.* Fry, 7 Taunt. 339; Wedlake *v.* Hurley, 1 C. & J. 83.

*Ga.* Georgia Seed Co. *v.* Talmadge, 96 Ga. 258, 22 S. E. 1001; Reviere *v.* Chambliss, 120 Ga. 714, 48 S. E. 122 (1904).

*Ill.* Since the passage of the Negotiable Instrument Act of June 5, 1907. Rauch *v.* Bankers' National Bank, 143 Ill. App. 625.

are to be found in the decisions of the United States Supreme Court, and in Alabama, Colorado, England, Georgia, Indiana,

*Ind.* Harrison, Rec., *v.* Wright, 100 Ind. 515; National Bank of Rockville *v.* Second National Bank of Lafayette, 69 Ind. 480; Rooney *v.* Dunleary, 39 Ind. App. 108, 79 N. E. 398 (1906).

*Ind. T.* Love *v.* Ardmore Stock Exch. 5 Ind. T. 202, 82 S. W. 721, 67 L. R. A. 617 (1904) (in the absence of acceptance); Poland *v.* Love, 164 Fed. 186 (1908) (when the check is given in regular business on an ordinary deposit account there is no assignment even though a deposit is made expressly to cover the check).

*Kan.* Clark *v.* Toronto Bank, 72 Kan. 1, 82 Pac. 582, 115 Am. St. Rep. 173, 2 L. R. A. (N. S.) 83, n. (1905). Special circumstances may give to the check the character of a *pro tanto* assignment, as where the action is not on the check alone but upon the whole transaction of which the giving of the check forms a part. Ballard *v.* Home National Bank, 91 Kan. 91, 136 Pac. 935 (1913).

A deposit of a check is not a deposit of money. Chapple *v.* Kansas Vitrified Brick Co., 70 Kan. 723, 79 Pac. 666 (1905).

*La.* Case *v.* Henderson, 23 La. Ann. 49 (1871).

*Md.* Moses *v.* Franklin Bank, 34 Md. 574 (1871).

*Mass.* Carr *v.* National Security Bank, 107 Mass. 45 (1871); National Bank *v.* Eliot Bank, 20 Monthly Law Reporter (N. S.) 138; 10 Monthly Law Rep. (N. S.) 138; Dana *v.* Third National Bank, 13 Allen 445, bill of exchange for more than the deposit. See Bullard *v.* Randall, 1 Gray 605; Gregory *v.* Merchant's National Bank, 171 Mass. 67, 50 N. E. 520; Allen *v.* Puritan Trust Co., 211 Mass. 409, 97 N. E. 916, 1915C L. R. A. 518.

*Mich.* Second National Bank *v.* Williams, 13 Mich. 282; Moore *v.* Davis, 57 Mich. 255; Grammel *v.* Carmer, 55 Mich. 201. See Strain *v.* Gourdin, 11 N. Bank Reg. 156; Sunderlin *v.* Mecosta Co. Savings Bank, 116 Mich. 281, 74 N. W. 478; Brennan *v.* Merchants and Manufacturers' National Bank, 62 Mich. 343, 24 N. W. 881; McIntire *v.* Farmers and Merchants' Bank, 115 Mich. 255, 73 N. W. 233; Lonier *v.* State Savings Bank, 149 Mich. 483, 112 N. W. 1119 (1907).

*Minn.* Northern Trust Co. *v.* Rogers, 60 Minn. 208, 62 N. W. 273. But see Wasgatt *v.* First National Bank, 117 Minn. 9, 134 N. W. 224, 1913D Ann. Cas. 416, 43 L. R. A. (N. S.) 109; First National Bank *v.* McConnell, 103 Minn. 340, 114 N. W. 1129, 123 Am. St. Rep. 336, 14 L. R. A. (N. S.) 616 (1908).

*Mo.* Dickinson *v.* Coates, 79 Mo. 250; Merchants' National Bank *v.* Coates, 79 Mo. 168; but the judges of other courts in this State are strong the other way. See, however, Kellogg *v.* Citizens' Bank, 176 Mo. App. 288, 162 S. W. 643 (1914), which says that it has long been settled in Missouri that the giving of a check is not an assignment; Pennell *v.* Ennis, 126 Mo. App. 355, 103 S. W. 147 (1907).

*N. J.* Creveling *v.* Bloomsburg National Bank, 46 N. J. L. 255; National Bank *v.* Berrall, 70 N. J. L. 757, 58 Atl. 189, 103 Am. St. Rep. 821, 66 L. R. A. 599 (1904).

*N. Y.* Chapman *v.* White, 2 Seld. 412; Winter *v.* Drury, 1 Seld. 525; New York Bank *v.* Gibson, 5 Duer 574; Grinnell *v.* Suydam, 3 Sandf. 133; Cowperthwaite *v.* Sheffield, 3 Comst. 243; (last four cases, bill of exchange); Luff *v.* Pope, 5 Hill 413 (order, on time, on an individual); Justh *v.* National Bank, 36 N. Y. Sup. Ct. 273; 56 N. Y. 478; People *v.*

Louisiana, Maryland, Massachusetts, Michigan, Minnesota,

Merchants' National Bank, 78 N. Y. 269 (1879); *Ætna National Bank v. Fourth National Bank*, 46 N. Y. 82 (1871); *Risley v. Phenix Bank*, 83 N. Y. 318 (1880). *Lunt v. Bank of North America*, 49 Barb. 221, only decides that a check is not so far an assignment of the drawer's funds, complete upon delivery, as to take precedence of a later assignment "of all property now belonging to" the drawer, executed and completed before a presentment of the check. It is a *cognate* principle to that which commands that checks be paid in order of presentment. But see *Roberts v. Corbin*, 26 Iowa 315; *Chapman v. White*, 2 Seld. 412 (bill of exchange); *Bullard v. Randall*, 1 Gray (Mass.) 605; *Butterworth v. Peck*, 5 Bosw. 341; *Mandeville v. Welch*, 5 Wheat. 286, 5 L. ed. 87. But see discussion of this case, *Harris v. Clark*, 3 Comst. 93. In this last-named case the court say that no authorities declare that an ordinary unaccepted bill of exchange operates *per se* as an immediate and complete appropriation or assignment, — and this not even in equity, — save only the case of *Corser v. Craig*, 1 Wash. (C. C.) 424, which case has been since overruled on this precise point by the authority of *Mandeville v. Welch*, *supra*. The court expressly decline, however, to bring checks into the same category. *People v. St. Nicholas Bank*, 77 Hun 159; *First National Bank v. Clark*, 134 N. Y. 368, 32 N. E. 38; *Hentz v. National City Bank*, 159 App. Div. 743 (1913), 144 N. Y. S. 979.

*N. C.* *Bank v. Bank*, 118 N. C. 786, 24 S. E. 524; *Hawes v. Blackwell*, 107 N. C. 200, 12 S. E. 245; *Perry v. Bank of Smithfield*, 131 N. C. 117, 42 S. E. 551 (1902); *Standard Trust Co. v. Commercial National Bank*, 166 N. C. 112, 81 S. E. 1074 (1914).

*Ohio.* *Cincinnati, etc. R. R. Co. v. Bank*, 54 Ohio St. 60, 42 N. E. 700; *Bank v. Brewing Co.*, 50 Ohio St. 151, 33 N. E. 1054; *Covert v. Rhodes*, 48 Ohio St. 66, 27 N. E. 94; *Blake v. Hamilton etc. Bank*, 79 Ohio St. 189, 87 N. E. 73, 128 Am. St. Rep. 684 n., 20 L. R. A. (n. s.) 290, n. (1908) (when the check is not certified).

*Okla.* *First National Bank v. School District*, 31 Okla. 139, 120 Pac. 614, 39 L. R. A. (n. s.) 655, n. (1912); *Ballen & Friedman v. Bank of Kremlin*, 37 Okla. 112, 130 Pac. 539 (1913). But if the check is drawn upon a particular fund there is an equitable assignment and the payee of the check may sue thereon. *Walters National Bank v. Bantock*, 41 Okla. 153, 137 Pac. 717, 1915C L. R. A. 531.

*Pa.* *Loyd v. McCaffrey*, 46 Pa. St. 410. In this case the facts did not call for the doctrine enunciated. *Saylor v. Bushong*, 100 Pa. St. 23; *First National Bank of Northumberland v. McMichael*, 106 Pa. St. 460; *Maginn v. Dollar Savings Bank*, 131 Pa. St. 362, 18 Atl. 901; *Tibby Bros. Glass Co. v. Farmers' etc. Bank*, 220 Pa. St. 1, 69 Atl. 280, 15 L. R. A. (n. s.) 519, n. (1908).

*Tenn.* *Planters' Bank v. Merritt*, 7 Heisk. 177 (1871); *Pickle v. Muse*, 88 Tenn. 385, 12 S. W. 919; *Aken v. Jones*, 93 Tenn. 364, 27 S. W. 669; *Pease & Dwyer v. State National Bank*, 114 Tenn. 693, 88 S. W. 172 (1905); *First National Bank v. First National Bank*, 127 Tenn. 205, 154 S. W. 965 (1913).

*Tex.* *New York L. Ins. Co. v. Patterson*, 35 Tex. Civ. App. 447, 80 S. W. 1058 (1904).

*Va.* *Baltimore etc. Ry. Co. v. First National Bank*, 102 Va. 753, 47 S. E. 837 (1904).

*Wash.* *Commercial Bank v. Chilberg*, 14 Wash. 247, 44 Pac. 264.

Missouri, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Virginia and Washington.

### *Weight of Reason*

§ 494. Another class of cases affirm that a check is an assignment as between drawer and payee, so that a *bona fide* holder is preferred to the creditors of the drawer under a subsequent assignment in insolvency; and that, upon presentment, the bank is brought into privity with the holder, and is liable to him for improper refusal to pay, and (in Illinois, Pennsylvania, Nebraska, and South Carolina at least), that a countermand from the drawer is no excuse for such refusal. Upon this side we find a goodly array of authorities,<sup>1</sup> and all the advanced, clear, independent

<sup>1</sup> § 494. *U. S.* *Mandeville v. Welch*, 5 Wheat. 286, 5 L. ed. 87, by the principles announced in it, must be placed upon the affirmative in the question of a holder's right, though not deciding that point.

*Conn.* See *Hoyt v. Seeley*, 18 Conn. 353.

*Eng.* *Ancona v. Marks*, 7 Hurl. & N. 686. See Grant on Banking prior to his edition of 1873, and Sharswood's Byles, p. 21.

*Ill.* *Munn v. Burch*, 25 Ill. 35; *Bickford v. First National Bank of Chicago*, 42 Ill. 238; *Rounds v. Smith*, 42 Ill. 245; *Brown v. Leekie*, 43 Ill. 497 (1867); *Chicago Marine & Fire Ins. Co. v. Stanford*, 28 Ill. 168 (1862); *Fourth National Bank v. City National Bank of Grand Rapids*, 68 Ill. 398 (1873); *Merchants' National Bank v. Ritzinger*, 20 Bradwell's App. 29 (1886); *Union National Bank v. Oceana County Bank*, 80 Ill. 212 (1875); *National Bank of America v. Indiana Banking Co.*, 114 Ill. 483, 2 N. E. 401 (1885); *Niblack v. Park National Bank*, 169 Ill. 517, 48 N. E. 438; *Gage Hotel Co. v. Union National Bank*, 171 Ill. 531, 49 N. E. 420; *Jacobson v. Bank*, 66 Ill. App. 470; *Pabst Brewing Co. v. Reeves*, 42 Ill. App. 154; *McAllister v. Oberne*, 42 Ill. App. 287; *Metropolitan National Bank v. Jones*, 137 Ill. 634, 27 N. E. 533; *Bank v. Union Trust Co.*, 149 Ill. 343, 36 N. E. 1029; *National Bank of America v. National Bank*, 64 Ill. App. 355; *Brown v. Schintz*, 98 Ill. App. 452 (1901), affirmed in 202 Ill. 509, 67 N. E. 172. Since the passage of the Negotiable Instruments Law a bank is not liable to the payee of a check before it accepts it. *Rauch v. Bankers' National Bank*, 143 Ill. App. 625 (1908). If the drawee of outstanding checks pays them after having been notified by a receiver of the insolvent drawer bank not to do so it is nevertheless liable to the receiver for the amount so paid. *First National Bank v. Selden*, 120 Fed. 212 (1903).

*Iowa.* *Roberts v. Corbin*, 26 Iowa 315 (1867); *Thomas v. Exchange Bank*, 99 Iowa 202, 68 N. W. 780; *Bloom v. Winthrop State Bank*, 121 Iowa 101, 96 N. W. 733 (1903); *Kuhnes v. Cahill*, 128 Iowa 594, 104 N. W. 1025 (1905), and the right of the holder of the check is superior to a subsequent attachment.

*Ky.* *Lester & Co. v. Given, Jones & Co.*, 8 Bush 357 (1871). See *Weinstock v. Bellwood*, 12 Bush 139 (1876). *Farmers' Bank & Trust Co. v. Newland*, 97 Ky. 473, 31 S. W. 38 (1895); *Columbia etc. Co. v. First*



thought and reasoning. See the cases below from the United States, Connecticut, England, Illinois, Iowa, Kentucky, Louisiana,

National Bank, 116 Ky. 364, 76 S. W. 156 (1903); *Robinson v. Pikeville Bank*, 146 Ky. 538, 142 S. W. 1065 (1912); *Commonwealth v. Kentucky Distilleries, etc. Co.*, 132 Ky. 521, 116 S. W. 766, 136 Am. St. Rep. 186, 21 L. R. A. (N. S.) 30 (1909); *First National Bank v. Barger*, 115 S. W. 726 (1909).

A debt evidenced by a check cannot be garnisheed if the check has been discounted for value in due course by an innocent purchaser even though the discount does not actually take place until after the service of the writ. *Boswell v. Citizens' Savings Bank*, 123 Ky. 485, 96 S. W. 797 (1906).

The rule that a check is an appropriation *pro tanto* has been changed by the adoption of the Negotiable Instruments Law. *Boswell v. Citizens' Savings Bank*, *supra*.

*La.* See *Vanbibber v. Bank of Louisiana*, 14 La. Ann. 481 (1857).

*Mass.* See the powerful dissent of Abbott in *National Bank v. Eliot Bank*, 20 Monthly Law Rep. (O. S.) 138; 10 Monthly Law Rep. (N. S.) 138.

*Minn.* *Varley v. Sims*, 100 Minn. 331, 111 N. W. 269, 117 Am. St. Rep. 694, 8 L. R. A. (N. S.) 828 (1907); *First National Bank v. McConnell*, 103 Minn. 340, 114 N. D. 1129, 123 Am. St. Rep. 336, 14 L. R. A. (N. S.) 616, n. (1908); *McFadden v. Follrath*, 114 Minn. 85, 130 N. W. 542, 37 L. R. A. (N. S.) 201, n. (1911).

In these three cases the question seems to be an open one. But see *Wassgatt v. First National Bank*, 117 Minn. 9, 134 N. W. 224, 1913D Ann. Cas. 416, n.; *Taylor v. First National Bank*, 119 Minn. 525, 138 N. W. 783, 1914A Ann. Cas. 1302, n. The last case holds that the assignment is not fully consummated until the check is presented for payment, and so may be countermanded by the drawer, at least, while it is in the hands of the payee.

*Mo.* See 4 Mo. App. 330, 7 Mo. App. 532, and 11 Mo. App. 292 (1881), but overruled in 79 Mo. 168.

*Neb.* *Columbia National Bank v. German National Bank*, 56 Neb. 804, 77 N. W. 346; *Fonner v. Smith*, 31 Neb. 107, 47 N. W. 632. See *Gruenther v. Bank of Monroe*, 90 Neb. 280, 133 N. W. 402 (1911), where a divided court held that one who, after receiving word from the bank that a certain check drawn upon it was good, and in reliance thereon took the check as payment, may maintain an action against the bank where the drawee has left on deposit the exact amount with which to pay the check with instructions to pay it when presented, and the money is retained for that particular purpose, irrespective of section 9330 Ann. Sts. 1911, which requires acceptance of a check to be in writing.

The holder of a check may sue if the money expressly deposited to pay it is yet in the bank, and an arrangement that the drawer might check in payment of a car load of horses on the security of a draft and bill of lading of the horses is the equivalent of putting the money to the drawer's disposal; and the fact that the drawer was overdrawn as a result of previous dealings is immaterial. *Fall City State Bank v. Wehrli*, 68 Neb. 75, 93 N. W. 994 (1903).

*N. M.* *Elgin v. Gross-Kelly*, 20 N. M. 450, 150 Pac. 922 (1915).

*N. Y.* *Harris v. Clark*, 3 Comst. 93.

*Ohio.* *Morrisons v. Bailey & Burgess*, 5 Ohio St. 15; *Dodge v. Bank*, 20 Ohio St. 246; *Chaffee v. First National Bank of Ravenna*, 40 Ohio St. 1. The Superior Court of Cincinnati said they could see no just reason

Massachusetts, Minnesota, Missouri, Nebraska, New Mexico, New York, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, and Wisconsin. Illinois and South Carolina are the strongholds of the doctrine.

§ 495. A third class of cases hold that at any rate a check is an equitable assignment between drawer and payee, whatever may be its effect between holder and bank.<sup>1</sup>

why a holder for value in good faith, and against sufficient funds, should not, when he gave notice, hold the specific fund appropriated by the check. *McGregor v. Loomis*, 1 Disney\* 247, 255. See remarks on this case, *In re Smith*, 15 National Bank Reg. 459, p. 465; *First National Bank v. Gish*, 72 Pa. St. 13 (1872).

*Pa.* *Hemphill v. Yerkes*, 132 Pa. St. 545, 19 Atl. 342.

*S. C.* *Fogarties v. State Bank*, 12 Rich. 518, a strong case. *Simmons v. Bank*, 41 S. C. 186, 19 S. E. 502; *McGahan v. Lockett*, 54 S. C. 364, 32 S. E. 429; *Loan & Savings Bank v. Farmers' etc. Bank*, 74 S. C. 210, 54 S. E. 364, 114 Am. St. Rep. 991 (1906); *Livingstain v. Columbia Banking etc. Co.*, 77 S. C. 305, 57 S. E. 182, 122 Am. St. Rep. 568, 22 L. R. A. (N. S.) 442, n. (1907); *Southern Seating etc. Co. v. First National Bank*, 87 S. C. 79, 68 S. E. 962, 29 L. R. A. (N. S.) 623, n. (1910). Notice of fraud or failure of consideration is no defence. *Loan & Savings Bank v. Farmers' Bank*, *supra*.

*S. D.* *Turner v. Hotsprings National Bank*, 18 S. D. 498, 101 N. W. 348, 112 Am. St. Rep. 804 (1903).

*Tex.* *Neely v. Grayson County National Bank*, 25 Tex. Civ. App. 513, 61 S. W. 559 (1901). But see *New York Life Ins. Co. v. Patterson*, 35 Tex. Civ. App. 447, 80 S. W. 1058 (1904).

*Wis.* *Pease v. Landauer*, 63 Wis. 20 (1885); *Raesser v. National Exch. Bank*, 112 Wis. 591, 88 N. W. 594, 88 Am. St. Rep. 979, 56 L. R. A. 174 (1902).

*Miscel.* *Brown v. Lusk*, 4 Yerg. (Tenn.) 210; *Morrisons v. Bailey*, 5 Ohio St. 13; *Corser v. Craig*, 1 Wash. (C. C.) 424; *Morton v. Naylor*, 1 Hill (N. Y.) 583; *Peyton v. Hallett*, 1 Caines (N. Y.) 28. The holder may compel payment in equity. *Gore Bank v. Royal Canadian Bank*, 13 Gr. Ch. R. (Can.) 425.

<sup>1</sup> § 495. *Gardner v. National City Bank*, 39 Ohio St. 600; *First National Bank of Cincinnati v. Coates*, 3 McCrary 9; *In re Brown*, 2 Story (C. C.) 502; and see *Spain v. Hamilton's Administrator*, 1 Wall. 604, 624, 17 L. ed. 619; *German Savings Institute v. Adae*, 8 Fed. 106; *Wheatley v. Strobe*, 12 Cal. 97; *National Exchange Bank v. McLoon*, 73 Me. 498; 1 Story Eq. Jur. 1044; *Coates v. First National Bank*, 91 N. Y. 20; *First National Bank v. Coates*, 8 Fed. 540; *Hall v. City of Buffalo*, 1 Keyes (N. Y.) 193; *Ballou v. Boland*, 14 Hun (N. Y.) 355; *Lett v. Morris*, 4 Sim. 607; *McWilliams v. Webb*, 32 Iowa 577; *Moore v. Lowrey*, 25 Iowa 336; *First National Bank v. D. S. R'y Co.*, 52 Iowa 378, 3 N. W. 395; *County of Des Moines v. Hinkley*, 62 Iowa 637, 17 N. W. 915; *Burn v. Carvalho*, 4 My. & Cr. 690; *Rodick v. Gandell*, 1 De Gex, M. & G. 763; *Robinson v. Hawksford*, 9 Q. B. 52; *Keene v. Beard*, 8 C. B. (N. S.) 372.

**Discussion of the Grounds of Decision in this Matter of the  
Check-holder's Rights**

*Between Drawer and Payee*

§ 496. The plain common sense of the holder's rights would seem to be, —

That as to the drawer, and those claiming under him otherwise than as *bona fide* holders for value, the check is to be sustained as a transfer of the fund against which it is drawn to the amount for which it is written. The same reasons of good faith and security in business transactions which induce the law to sustain a *bona fide* sale of property, or assignment of bills or notes, against a subsequent assignee in insolvency of the assignor, apply to the case of a check.

A vast amount of business is done by checks. It would not be good faith in the drawer to withdraw his funds after giving the check, and it is elementary law that, in an assignment for the benefit of creditors,<sup>1</sup> the latter have no greater rights than the assignor except in case of an illegal transfer.

*Between One Holder and Another*

§ 497. That as between a check-holder, H., and the holder, D., of a check subsequently drawn, but presented and paid before H. makes presentment, if D. were a *bona fide* holder for value without notice, his equity and right would be superior to that of H., just as in case of a subsequent mortgage, recorded before its predecessor. And the bank also must be protected ; for when a check is presented

<sup>1</sup> § 496. An assignee in an assignment for the benefit of creditors stands in the shoes of the assignor, and neither he nor the creditors he represents are purchasers for value without notice, but are subject to all equitable liens and transfers. Burrill on Assignments, 484; *Roberts v. Corbin*, 26 Iowa 327.

It is a general principle, that whenever there is a legal or equitable assignment before service of attachment on the debtor, or of garnishee process, and the assignee gives notice before judgment is rendered for the attachment or garnishee creditor, the assignee will have priority, even though the debtor or holder of the garnisheed fund had no notice of the assignment before the process was served, and if he did have such previous notice the same rule holds of course. *Giddings v. Coleman*, 12 N. H. 153; *Maher v. Brown*, 2 La. 492; *Anderson v. De Soer*, 6 Gratt. (Va.) 363; *Legro v. Staples*, 16 Me. 252; *Adams v. Robinson*, 1 Pick. (Mass.) 461; *Colt v. Ives*, 31 Conn. 25.

it is the bank's duty to pay, if it has sufficient unincumbered funds, and it cannot be bound by matters of fact of which it had no notice.

These rules are necessary to the protection of business. Acts must be sustained that are *bona fide* done in the exercise of reasonable care and foresight, or the foundation of financial prosperity will be shaken.

*Between Holder and Creditors of Drawee Bank*

§ 498. That as between H. and the creditors of the drawee bank, if the latter is insolvent before presentment of the check for payment, H. cannot claim a preference. The check can do no more than make the bank a debtor to H. instead of to the drawer, and H. would take with the other creditors. But if the check is presented for payment and refused, we think, —

*Between Bank and Holder*

§ 499. That as between the bank and the holder presentment for payment works a transfer of the fund. If the unincumbered funds in its possession are sufficient, and this fact is within the knowledge attainable by the bank with reasonable diligence, it is the *duty of the bank to pay the check*;<sup>o</sup> it is bad faith on its part, or negligence, not to do it, and the check-holder is directly injured by its wrongful conduct; what more does the law require as the basis for a right of action? These are the elements that underlie all civil liability, — conduct detrimental to the community, and damage to an innocent individual directly resulting from it. And whenever it can be done without an expense, or other counter injustice, greater than that to be remedied, the law should step in. Analyze all the cases in the books, of contract or tort, and you will find in the crucible at last only these two bases of legal chemistry. And in the matter before us they are clearly present; the detrimental conduct is all on one side, and there is no mingling of causes and effects, and no intricate and expensive inquiry necessary to discover the path of justice; there is nothing to hinder the application of the law to remedy the wrong. Bad faith and negligence are injurious to society as well as to the individual, and the law everywhere seeks to repress them and throw the loss they occasion upon the shoulders of their possessors. Everywhere also it should be

<sup>o</sup> § 499. See *Standard Trust Co. v. Commercial National Bank*, 166 N. C. 112, 81 S. E. 1074 (1914).

the object of the law to save litigation, by allowing the real party interested to sue the one finally responsible, in tort or in contract, as may be convenient; for since the law implies contract obligations wherever it deems them necessary for the cause of justice, the line between the two kinds of liability is very shadowy, and historically many of the branches on each side drew life from the same root. Legal analogies are plenty and forcible. B. writes, "I promise to pay D. or order \$100 on demand." D. orders the money paid to H.; it is perfectly clear that H. can sue B. if he refuses to pay according to his promise. B. has in fact promised to pay H., for he engaged to pay to whomsoever D. should order, and H. is D.'s order. Now a bank receiving \$100 on general deposit impliedly promises (by the universal understanding of trade as ascertained in innumerable and unbroken decisions) to pay that money to the depositor, or such persons, and in such amounts, as he may order.

Where, then, is the difference between the position of the holder of a check and the indorsee of a note? The amount is fixed in the note from the start; in the check, however, B. only says you must not go beyond your deposit, but you may fill in the check for a less amount if you wish, and I will pay it; that is a promise to pay the amount of a properly drawn check, just as truly as a note is a promise to pay the amount named in it. As soon as the check is drawn and presented, the promise takes effect on the definite amount. The only other difference is that one promise is in writing and the other verbal or tacit; but this can make no substantial difference, except as opening the door to the fraud of a depositor who draws more than one check against the same money, and this can never affect the bank, as its promise and duty are only to pay checks as they are presented. It is a general rule<sup>1</sup> of

<sup>1</sup> (a) If A. pays money to B. for C., the latter may sue B. *Farmer v. Russell*, 1 B. & P. 296; *Carnegie v. Morrison*, 2 Met. (Mass.) 402; *Arnold v. Lyman*, 17 Mass. 400; 2 Green. Evid. 109; and see *Abbott's* powerful dissent in *National Bank v. Eliot Bank*, 20 Monthly Law Rep. (n. s.) 138, 10 Monthly Law Rep. (n. s.) 138, which was approved in *Fogarties v. State Bank*, 12 Rich. (S. C.) 518.

(b) B., by accepting money to pay to C., impliedly promises to do so. And C. may sue as the real party in interest, and the one damaged by breach of the promise, and the same rule holds although C. remains to be designated at a future time. *Weston v. Barker*, 12 Johns. (N. Y.) 276; *Fenner v. Meares*, 2 W. Bl. 1269.

(c) Where A., being in debt to B., put a bill of exchange in bank to collect and pay B., it was held that B. could sue the bank, for the promise implied was for the benefit of B., and, though not privy to the considera-

law, that, if a promise is made by B. to D. for the benefit of H., the latter can sue B. for the breach. From this principle also results, as a corollary, the right of a check-holder to sue the bank.

tion, he could sue. *Delaware & Hudson Canal Co. v. The Westchester County Bank*, 4 Denio (N. Y.) 97, quoting many cases.

(d) In *Brewer v. Dyer*, 7 Cush. (Mass.) 340, the court say that, where one for value engages with another to do some act for the benefit of a third, the latter may sue for the breach.

In *Carr v. National Security Bank*, 107 Mass. 48, it is said that the general rule is, that C. cannot sue on B.'s promise to A. for C.'s benefit when no consideration moves from C., and the exception which holds B. when funds have been put in his hands to pay the creditors of A. has not been extended to cases where neither the creditors nor the amounts of their debts are ascertained. (This, as we have seen in (b), is not wholly true.)

In *Mellen v. Whipple*, 1 Gray (Mass.) 321, the court endeavors to distinguish *Brewer v. Dyer*, but there is no real difference in principle. The learned judge names several classes of exceptions to the rule that the consideration must move from the plaintiff:—

1st. In case of money had and received, where assumpsit is maintained because the defendant has in his hands money which in equity and good conscience belongs to the plaintiff. *Exchange Bank v. Rice*, 107 Mass. 37; *Tweedle v. Atkinson*, 30 L. J. Q. B. 265.

2d. Cases in which the nearness of relation of the plaintiff to the promisee may have been the ground of decision, as the court think. As in *Dutton v. Pool*, 1 Vent. 318, where the defendant promised a father, who was about to fell timber to raise a portion for his daughter, that, if he would forbear, the defendant would pay the daughter \$1000, and an action was sustained by the daughter.

3d. Such cases as *Brewer v. Dyer*, 7 Cush. (Mass.) 337, where D. promised A., the lessee of a shop, to pay the rent to L., the landlord of A. L. recovered from D. the rent for the time of the lease after D. left the premises. Now in this case D. had no money of L.'s, nor had he received a benefit for which he must account, nor had L. lost anything, for there was nothing to show that the rent could not be collected of the lessee. It was a clear holding that, where D. promises A. to pay L., the latter, who is the real party in interest, can sue on the contract. Such an arrangement brings the end parties together and saves litigation, which is rightly one of the great aims of the law.

In 1 Gray, after speaking of these cases, the court remark that it will not extend the exceptions beyond the decided cases. But it is the spirit and principle of those cases that should be looked to, and not precise identity of facts, and certainly the money of a depositor in equity and good conscience belongs to the check-holder on presentation of the check, and the holder is the real party in interest, and litigation may be saved by allowing him to sue the bank directly.

The decision of Chief Justice Shaw in *Carnegie v. Morrison*, 2 Met. (Mass.) 396 (1841), is so clear and forcible that we quote a couple of pages from it. The holding was, that, if A. promises to accept a bill of exchange drawn by B., a third party, C., though he cannot sue A. as acceptor, may nevertheless maintain an action against him on the promise to B.

"The objection to such an action and the ground of this defence are,

§ 500. Suppose the drawer fails after the bank's refusal to pay the holder, and he loses half the amount of it, or suppose, after refusal, the drawer checks out the money himself and absconds,

that the immediate parties to the transaction were Bradford on the one side, and the defendants on the other; that to this transaction the plaintiffs were strangers; and that as Bradford acquired some right under it, and had a remedy upon it against the defendants, their contract must be deemed to be made with him, and not with the plaintiffs. But this position presupposes that the same instrument may not constitute a contract between the original parties, and also between one or both of them and others, who may subsequently assent to and become interested in its execution; an assumption quite too broad and unlimited, which the law does not warrant. In a common bill of exchange, the drawer contracts with the payee that the drawee will accept the bill; with the drawee, that if he does accept and pay the bill, he, the drawer, will allow the amount in account if he has funds in the drawee's hands; otherwise, that he will reimburse him the amount thus paid; he also contracts with any person who may become indorsee, that he will pay him the amount if the drawee does not accept and pay the bill."

The bill in this case was as follows:—

"Whereas John Bradford is indebted to Messrs. Carnegie & Co., of Gottenburg, in the sum of £3,000, and has requested us to pay them that amount for him, by means of bills of exchange to be drawn on us at London, we hereby, for value received of him for that purpose, to our satisfaction, promise to accept their bills to that amount, payable to themselves or their order, and pay them accordingly.' . . .

"The question is, supposing a general failure in the performance of this undertaking, who is entitled to a remedy for such breach, and by what law shall this question be determined? The assurance or promise is in terms made to Bradford; but the substantial benefit to be derived from the performance of it would be the plaintiffs', and therefore they are damnified by the breach. Bradford had procured the defendants to pay his debt for him to the plaintiffs for a satisfactory pecuniary consideration, and immediately gave notice thereof, and remitted the contract to the plaintiffs, who assented to and accepted it. It may be fairly presumed that, but for this transaction, Bradford would have adopted some other mode of remittance. . . .

"It seems to have been regarded as a settled point, ever since reports have been published in this State, rather than as an open question to be discussed and considered. The position is, *that when one person, for a valuable consideration, engages with another by simple contract to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement.*

"In *Felton v. Dickinson*, 10 Mass. 287, the case was, that a father made a special agreement with a person for the employment of his son till twenty-one years old; whereupon the employer promised to pay the son \$200 when he should come of age. The promise was in terms to the father; but being for the benefit of the son, it was held that the son might maintain an action upon it. Perhaps the relation of father and son might have had some influence, and been supposed to bring the case more exactly within the principle of the familiar case of *Dutton v. Pool*, 1 Vent. 318. But the position is laid down broadly by the court, in general terms, that where a promise is made to one for the benefit of

or is found to be utterly worthless; the holder loses the whole value of the check by reason of conduct on the part of the bank

another, he for whose benefit it is made may bring an action for the breach of it. And this position is supported by a citation from Comyn's Digest and Rolle's Abridgment.

"Hall v. Marston, 17 Mass. 575, is a leading and decisive case for the proposition, that where one receives money from another, to the use of a third, the latter may maintain an action for it, though there has been no communication between the depository and the person for whom it was received, and no assent on the part of the party receiving it to pay it over, except that which is to be implied from the act of receiving it with such direction. . . .

"A case directly in point, in support of the general proposition, is that of Arnold v. Lyman, 17 Mass. 400. A debtor, in failing circumstances, placed property, consisting of securities and goods, in the hands of the defendant and took from him a written agreement, reciting such deposit, and promising to pay certain debts enumerated, and amongst them that of the plaintiff. After an able argument for the defendant, it was decided that the action was maintainable. The court considered that the consideration was good, although it moved from the debtor of the plaintiff and not from the plaintiff himself; and although the debtor might have maintained an action upon this promise, had he been compelled to pay his debt to the plaintiff, yet the plaintiff might maintain an action in the first instance, if he elected to affirm the act done in his behalf by the debtor, and avail himself of the promise of the defendant, made for his benefit. The court affirm the general proposition, that he for whose interest a promise is made may maintain an action upon it, although the promise be made to another and not to himself. There are several other cases in which this doctrine is recognized." (pp. 400-403.)

The general tendency of American authority is to hold that, when one makes a promise to another for the benefit of a third, the latter may sue upon it, although the consideration does not move from him. *Bohanan v. Pope*, 42 Me. 93; *Beers v. Robinson*, 9 Pa. St. 229; *Brown v. O'Brien*, 1 Rich. (S. C.) 268; *Barker v. Bradley*, 42 N. Y. 316; *Crocker v. Higgins*, 7 Conn. 347, *Brewer v. Dyer*, 7 Cush. (Mass.) 337; *Barringer v. Warden*, 12 Cal. 311. And the promise will be implied where a legal duty to pay exists. *Ross v. Curtis*, 30 Barb. (N. Y.) 238.

In 100 Ind. 515, the court said that a promise upon a good consideration, made for the benefit of third parties, may be taken advantage of and enforced in equity by such third parties, is well settled. And the fact that at time the promise is made the third parties are not aware of it, and they, and the amount of their claims against the promisee are unknown to the promisor, makes no difference under the decisions of this and other courts. For want of privity of contract between the promisor and such third parties, such contracts could not be enforced under the common law. We cite some of the cases: *Bird v. Lanius*, 7 Ind. 615; *Hardy v. Blazer*, 29 Ind. 226, and cases there cited; *Devol v. McIntosh*, 23 Ind. 529; *Durham v. Bischof*, 47 Ind. 211; *Fisher v. Wilmoth*, 68 Ind. 449; *Miller v. Billingsly*, 41 Ind. 489. It should be noted that in these cases, except perhaps one in which work was done on the faith of the promise, the claims of the third parties were in existence when the promise was made. *Loeb v. Weis*, 64 Ind. 285; *Beers v. Robinson*, 9 Pa. St. 229. And so promissory notes and bills of exchange under some circumstances,



which all the cases agree in condemning as wrongful and contrary to its duty. What must we think of a system of law that claims as one of its fundamental maxims, "Wherever there is a right there is a remedy," and proclaims that for every injury the law will give redress, and yet denies the right of the check-holder to sue the drawee?

We hope that it will not be many years before it will cease to be possible to find this blot on the common law. No amount of deciding in the United States Supreme Court, nor in any other chamber of wisdom, can make the unjust just, and as surely as the Dred Scott decision is dead, so surely will the decision in the *National Bank of the Republic v. Millard* die, with the judges who rendered it.

*Between Drawer and Bank*

§ 501. It has been held that, as between the drawer and the bank, payment in good faith upon a genuine check should be sustained, even if the drawer countermanded the payment. If the drawer names a reason legally sufficient to prevent the check's payment, it would be of course but ordinary prudence for the bank to satisfy itself upon the right of the holder before making payment; for example, in case of a check payable to bearer, lost or stolen. But a mere countermand without good cause is a fraud on the part of the drawer, and ought perhaps to be no authority to the bank to sustain him in his fraudulent conduct, though it may be doubted if it is not going a little too far to hold that the bank must disobey the order of the depositor. It would seem enough if it pays on presentment when there is no countermand, and if there is one, it is a matter between the drawer and holder as to its rightfulness. To be sure, he may accomplish the same purpose by checking out the money, and it would seem clear that, if the bank had no notice of the check outstanding, it could not be held responsible for intermediate paying out of the money upon an order valid on its face.

*Question when the Bank has Notice of an Outstanding Unpresented Check*

The question whether, if the bank has notice of a check (A.) outstanding, it is to be held in case of paying checks, presented and checks where the holder is entitled to fill a blank with the name of the payee, are exceptions to the common law rule as to privity of contract. In such cases, of course, the payee is not known at the time the check is issued. 2 Whart. Con. § 795.

previous to A. though drawn subsequently, would seem properly answerable in the negative, unless perhaps when the check of which it has notice *is more than a check*, and constitutes an assignment of the whole deposit, so that the depositor has no right to draw any further checks upon it. It may be said that the depositor has no right to draw after checks at any time so as to diminish the deposit to such an extent as to bring it below the outstanding check, and this is true; but, on the other hand, in the light of usage and reason, the bank does not agree, and cannot be expected, to keep track of all the checks that may for any length of time be outstanding all over the country. \* It seems enough if it does its own duty by paying checks as they are presented, without having to keep extensive additional and inconvenient accounts simply to guard against the fraud of the drawer.

It would seem the only rule well adapted to secure certainty and despatch in commercial transactions, to hold that, before actual presentation of a check to the bank for payment (or certification if the bank chooses to certify), the holder should rest upon the faith of the drawer alone, but that presentment should be held to bring the bank and holder into that position contemplated by the bank in its agreement to pay the person named in an order from the depositor. At this point the person and the sum to be paid become definite to the knowledge of the bank; it has an opportunity to see if the order is genuine, and if it is, the promise of the bank at the reception of the deposit attaches upon the facts, and renders the bank liable to the check-holder.

### *Fallacy in the Negative*

§ 502. When we come to consider the opposition to these views it is well to note first the causes of the confusion that exist on this question. If one were to say, Some animals walk on four legs, — a man is an animal, therefore a man walks on four legs, — no one would be deceived for a moment by the fallacy; yet a very similar *non sequitur* lies at the basis of the New York rule on the holder's rights. A check is a bill of exchange; bills of exchange (*i.e.* some bills of exchange, those which have been before the courts on this question) are clearly not an assignment, and do not give the holder any right to sue the drawee until acceptance, or until the amount is charged up to the drawer, unless drawn upon a specific designated fund; and

therefore a check does not operate as an assignment except under the same circumstances.

Here we have the same fallacy, for although checks constitute a species of the genus bills of exchange, they differ from *other* bills in precisely those characteristics from which the above consequences flow. A bill ordinarily does not purport to be drawn against funds, the drawee does not hold money on purpose that it may be drawn against in parcels, he has made no promise express or implied to pay such orders, and it follows of course that no right accrues against him till he accepts; but a check is precisely opposite in these respects, and it would seem from this fact alone that the legal consequences should be opposite. The confusion of thought is further shown by the frequent quotation of cases<sup>1</sup> involving bills of exchange proper, or orders on an individual not a banker, in support of the New York rule.

*Building upon Authorities not to the Point*

§ 503. Second, the trouble had been augmented by quoting as authority the overflow of judges in cases where the real question did not arise. As in *Chapman v. White*, wherein a decision perfectly just on the facts was rendered, but, as is so often the case, the court laid down very broad propositions, perfectly true so far as they applied to the facts of the case at bar, but capable of many other applications perhaps entirely unthought of by the judge, and certainly not weighed as they would have been if the case had involved them; yet these broad statements are taken up by subsequent judges, and, to save the trouble of thinking, are made the basis for judgments that the originator of the cited principle would very likely repudiate.

*Too Narrow a View*

§ 504. Third. Some conflict has arisen by reason of the differences in the *breadth* of view taken by different judges. For example, when a question arises between the holder of a check and the creditors of the drawer under an insolvent assignment

<sup>1</sup> § 502. *Mandeville v. Welch*, 5 Wheat. 277, 5 L. ed. 87 (bill of exchange), checks excepted by the language of the court. *Grinnell v. Suydam*, 3 Sandf. (N. Y.) 133; *New York Bank v. Gibson*, 5 Duer (N. Y.) 574 (1856); *Cowperthwaite v. Sheffield*, 3 Comst. (N. Y.) 243 (1860), all bills of exchange; and *Luff v. Pope*, 5 Hill (N. Y.) 413 (order on an individual).

subsequent to the check, if the attention is confined to the parties in this one transaction, it may be difficult to see how the holder has a better equity than the creditors. Each has trusted the drawer, each has given value, and why should not each bear his share of the loss? But if the effect upon commercial life of subjecting checks to this uncertainty be considered, it appears at once that justice to social prosperity requires that the check-holder shall be preferred just as the transferee of a note or bill, or of any other property or representative thereof.

*Failure to Draw the Line at Presentment*

§ 505. Fourth. Another source of confusion has been the failure to distinguish between the time prior to presentment and the time after. It is perfectly true that a check works no instant assignment as to the bank. But from this it does not follow that a new and different set of obligations may not be created by the facts of a proper presentment and demand made by the payee or bearer upon the bank. An altered condition of circumstances will call for an altered condition of legal relationship and obligation. Obviously, if the usage of banking entitles the holder to payment upon presentment and demand, it is no answer to say that before presentment and demand he had acquired no title to the money as assignee.

*Privity*

§ 506. Fifth. The argument usually relied on, especially in New York and in the United States Supreme Court, is that there is no privity between the bank and the holder, the agreement being between the bank and the depositor. This objection cannot be conceded any weight at all, for privity is a thing the law manufactures whenever it sees fit;<sup>1</sup> if it were not so, much of the law under the head of implied contracts would not exist. Moreover, it is very clear that there is a privity between the bank and holder established by the promise of the bank to pay whomsoever the depositor may designate, which promise is implied from the usage of business. (See § 499, n. 1.) Again, it is well established that

<sup>1</sup> § 506. The principle is elementary, that, where one receives money for another, and the law makes it the duty of the person receiving it to pay it over to him for whose use it was received, a promise to pay it in accordance with the duty is always presumed, and a *privity established as matter of law between the parties*. *Ross v. Curtis*, 30 Barb. (N. Y.) 238 (1859).

a chose in action, or a part of it, may be assigned ;<sup>2</sup> and this once conceded, the argument of want of privity between the assignee

<sup>2</sup> At common law a chose in action could not be assigned, as it was considered to tend to the increase of litigation and to oppression, by putting claims (perhaps inequitable ones) in the hands of the rich and powerful. But equity soon began to allow the transferee to sue if he had a real justice, and as a part of this doctrine it is now perfectly settled, that if "B., as a depositary or otherwise, holds a specific sum of money which he is bound to pay to A., and if A. agrees with C. that the money shall be paid to C., or assigns it to C., or gives to C. an order upon B. for the money, the agreement, assignment, or order creates an equitable interest or property in the fund in favor of the assignee C., and it is not necessary that B. should consent or promise to hold it for or pay it to such assignee." Pomeroy, Eq., § 1280, and cases cited.

Equity recognizes an interest in the fund, in the nature of an equitable property obtained through the assignment, or the order which operates as an assignment, and permits such interest to be enforced by an action, even though the debtor or depositary has not assented to the transfer. And it is also clear, that in *equity* a part of a chose in action may be assigned, and there is no doubt that such an assignment will be upheld and enforced whether the debtor has assented or not, — though at *law* the depositary has a right to demand that the debt shall not be assigned in parcels, since it is due as a whole, and it may inconvenience him to have it split up and the matter subjected perhaps to several suits, but this of course would not apply if the depositary had agreed that the debt might be assigned in parts. *McFadden v. Wilson*, 96 Ind. 253, and case there cited; *Wood v. Wallace*, 24 Ind. 226; Pomeroy, Eq., § 1270 *et seq.*, and cases there cited.

In Story's Equity Jurisprudence, § 1044, it is said, after stating the rule at law: "But in cases of this sort the transaction will have a very different operation in equity. Thus, for instance, if A., having a debt due to him from B., should order it to be paid to C., the order would amount in equity to an assignment of the debt, and would be enforced in equity, although the debtor had not assented thereto. The same principle would apply to the case of an assignment of a part of such debt. In each case a trust would be created in favor of the equitable assignee of the fund, and would constitute an equitable lien upon it."

Where there is an intention of the drawer and payee that a fund or chose in action, or a part of either, shall be assigned, the assignment may be effected by an order, bill, or check. In such cases the intention controls, and will be given effect by the courts. It is upon this principle that an order upon the whole of a special fund operates as an assignment. See Pomeroy, Eq., § 1280 *et seq.*, and cases there cited; Bispham, Prin. of Eq., 9th. ed. § 167, and cases there cited.

Says Mr. Pomeroy, "What shall amount to the present appropriation which constitutes an equitable assignment is a question of intention, to be gathered from all the language construed in the light of the surrounding circumstances." Pomeroy, Eq., § 1282. So it is said by the same author in the latter portion of section 1284 of the same work, "*A check may undoubtedly operate in this manner as an equitable assignment, when it is so drawn as to show an unmistakable intention of the drawer to transfer his exact deposit in the bank to the payee.*" See also *Kingman v. Perkins*, 105 Mass. 111; *Macomber v. Doane*, 2 Allen (Mass.) 541. In the case

and the debtor or holder of the fund is disposed of under the equitable and statutory rules. If, by the assignment, the assignee acquires a legal right, it is by force of the statute, without regard to the assent of the debtor or holder of the fund. If he acquires an equitable assignment and right simply under the rules in equity, this right is independent of any assent by the debtor or holder of the fund.

### *Double Action*

§ 507. Sixth. The objection that the bank is liable to a double action if both the drawer and the holder are able to maintain a suit, seems entitled to little or no weight. If by its wrongful act the bank has done to each one of these two persons a separate and distinct injury, there is no reason why it should not make compensation to each. If it has injured the drawer's credit by its wrongful refusal to honor his check, it should be liable in damages. If it has caused a direct loss to the payee by refusing to give him the money which it ought to have given him, there seems no reason why it should not recoup him. The holder of an unpaid check may have recourse against the drawer; but suppose that, after the wrongful refusal to pay and before this recourse can be made effectual, some circumstance (as, for example, the drawer's bankruptcy) should intervene and make this recourse practically useless, then the holder loses his money; the bank is to blame, it has

of *Kahnweiler v. Anderson*, 78 N. C. 133, it was held that the intention to assign, founded upon a consideration, and expressed by a bill or draft, operates as an equitable assignment. In the case of *Bank of Commerce v. Bogy*, 44 Mo. 15, it was said that the drawing of a bill of exchange does not, of itself, operate as an equitable assignment of the debt, but is evidence tending to show such an assignment; that anything that shows an intention on the one side to make an irrevocable transfer of the debt or fund, and from which an assent to receive it may be inferred, will operate in equity as an assignment.

At law, the right to sue upon the equity of assignment was early given, in order to save the plaintiff the expense of going to chancery, but the action had to be in the name of the assignor; this, however, is by statute changed in many States, and the law brought up abreast of equity.

In the following States all choses in action arising on contract are assignable, and in the first eight the assignee may sue in his own name: Maine, New York, Indiana, Michigan, Texas, Florida, Alabama, Massachusetts, Minnesota, Kansas, North Carolina, Tennessee, Arkansas, California, and Georgia; also in New Mexico and Arizona Territories.

In the following States and Territories the assignee can sue in his own name, so far as choses in action are assignable, which is in varying degree: Connecticut, New Jersey, Pennsylvania, Nebraska, Maryland, Delaware, Virginia, West Virginia, Mississippi, Washington and Idaho.

caused the loss, by acting in defiance of its acknowledged duty, of the purpose for which it received its corporate privileges, of the universal custom and usage of the banking business; and yet, as the law probably stands at present, the holder has no remedy against the bank, though it has wilfully and seriously injured him. A good example of the hardship and injustice which would be wrought by a rigid enforcement of the rule denying to the check-holder a right of action under any circumstances is to be found in *Fourth National Bank of Chicago v. City National Bank of Grand Rapids*, 68 Ill. 398.

Parties are often liable to different suitors for one wrongful act, a trespasser may be liable to the tenant and to the reversioner, and one promising to discharge an incumbrance may be liable for his failure to the promisee and also to the holder of the incumbrance. (See § 499, n. 1.) The action by the holder would be for the amount of the check; that by the drawer for the dishonor of his order is not for the amount of the check, but for the injury done to his credit.<sup>1</sup>

§ 508. Seventh. It is objected in Massachusetts, that "the holder of the check cannot take advantage of the implied promise to pay the depositor's checks, because, at the time the deposit is made, neither the name of the holder nor the amount of his check is known." But this is only an illustration of the failure above noted to recognize the act of presentment as the line of the bank's liability. At presentment the name of the holder and the amount of his check become known, and it is not claimed that the bank is liable before presentment.

§ 509. Eighth. It is said that if the bank is liable to the holder it must pay, although the drawer has countermanded the check, and thus involve itself in difficulties. This, however, does not follow as a necessity, and it is questionable how far it is proper to compel the bank to look into the right between the drawer and holder. Little trouble could arise if a uniform and well-understood rule were established either way as to countermand; but it would seem safest and best to rule that the bank should hold the money until the holder and drawer had settled the matter between themselves, at law, by compromise, or otherwise, and that the bank should not be harassed by suits in such cases where the real question is between other parties.

<sup>1</sup> § 507. *Whitaker v. Bank of England*, 6 C. & P. 700; *Marzetti v. Williams*, 1 Barn. & Ad. 415; *Rolin v. Stewart*, 14 C. B. 595.

*No Words of Transfer*

§ 510. Ninth. In 100 Indiana Reports it is said that in the absence of any evidence except what the check furnishes, it must be presumed that the payee takes the check upon the credit of the drawer, and the court bases its decision chiefly on the ground that a check contains no words of transfer, and is not sufficient evidence of an intent to transfer the fund. Now it is well understood that it is a fraud to draw a check without funds as a basis for it, and this is not consistent with any view except that the payee takes the check on faith of the funds in the hands of the bank, as well as on faith of the drawer in case of the bank's refusal or insolvency. It is not necessary that negotiable paper should be taken on the faith reposed in one person alone. After all, the real question is simply this: What construction of a check consistent with the usages of business is best calculated to advance justice, and secure good faith and the convenient despatch of business? And it seems to us that the answer in *Bank of the Republic v. Millard* is not the true one, but a sliding out from under the question on a technical plank.

**Special Facts that may Influence the Decision, taking the Case  
out of the General Problem**

*Designated Fund*

§ 511. (a) An order to pay a debt out of a particular designated fund is an equitable assignment.<sup>1</sup> Though an ordinary bill of exchange or check is not an assignment, yet if a particular fund is specified out of which the amount is payable, the depository after notice must keep the fund as a special deposit, for the benefit of the payee,<sup>2</sup> and no acceptance by the debtor is necessary in equity.<sup>3</sup>

*Charging the Drawer*

(b) Also if the bank charges the drawer of a check with the amount of it, the holder can sue the bank in assumpsit for money had and received. These exceptions are recognized in the cases,

<sup>1</sup> § 511. *Bradley v. Root*, 5 Paige (N. Y.) 632; 1 Parsons on Bills and Notes, 336, ed. 1863.

<sup>2</sup> *Ballou v. Boland*, 14 Hun (N. Y.) 359.

<sup>3</sup> *Kirtland v. Moore*, 40 N. J. Eq. 106, 2 Atl. 269.



which deny in general that a check is an assignment, or gives the holder any right of action against the drawee.<sup>4</sup> Where a depositor settling with the bank left the exact amount of an outstanding check expressly for its payment, this was of course held to make the bank liable to the holder, as on an implied acceptance.<sup>5</sup>

### *Words of Transfer*

(c) A debt or part of it may be assigned even orally by agreement on sufficient consideration; and although an ordinary check is not proof of such an assignment of itself, yet, if the assignment is properly proved, the assignee can sue the holder of the fund or debtor, and in many States the action may be in his own name.<sup>6</sup> In Massachusetts the assignment must be in writing. If there are words of transfer in the check, or the intent of the parties to transfer the debt is clear,<sup>6a</sup> it will sustain a suit without assent of the depositary if the *whole* debt is transferred. If only part, the same rule holds in equity, though at law the consent of the depositary is necessary.<sup>7</sup>

Where a depositor in a bank drew a check reciting on its face that it was to take up certain notes of his held by the bank, and handed it in to the bank, it was held an appropriation of so much of his deposit as it called for, operative from the time of presentment, and effecting a payment of the notes.<sup>8</sup>

### *Acceptance*

(d) It has never been questioned that where the bank has by an act, as, for example, certification, come under a distinct, independent original obligation to whomsoever may be the owner of the check, then such owner may recover the amount in a suit brought in his own name directly against the bank. Some curious developments from this rule have taken place. Thus, where a check is made payable to order, if the bank pays it to a wrongful

<sup>4</sup> *National Bank of the Republic v. Millard*, 10 Wall. 152, 19 L. ed. 897.

<sup>5</sup> *Saylor v. Bushong*, 100 Pa. St. 23 (1882). So where a check drawn to C. was paid to B. on his forgery of C.'s name, and the bank charged it up to the drawer, this was held an acceptance, and C. recovered of the bank. *Seventh National Bank v. Cook*, 73 Pa. St. 483.

<sup>6</sup> *Risley v. Phoenix Bank*, 83 N. Y. 318. See § 506, n. 2.

<sup>6a</sup> *Throop Grain Cleaner Co. v. Smith*, 110 N. Y. 183, 17 N. E. 671.

<sup>7</sup> See *Harrison, Rec. v. Wright*, 100 Ind. 515, and note on Assignment.

<sup>8</sup> *Laubach v. Leibert*, 87 Pa. St. 55.

holder upon the strength of a forged indorsement, and charges the drawer with the amount thereof in account, it thereby agrees to honor the check, undertakes to pay it to the payee or indorsee, becomes the agent of such payee or indorsee, holds the amount for him, and is bound to pay it to him. But, in fact, by paying the amount to a person who is not the payee nor the indorsee and owner under a genuine indorsement, the bank does not acquit itself of these obligations, which still remain in full force and effect, and in no way satisfied. The bank is therefore still liable to pay to the real party to whom it owes the money, and whose agent and debtor it really is. Such party may sue the bank in his own name and recover the full amount of the check.<sup>9</sup> But there is some discrepancy in the language of the cases cited as to whether this rule would apply where the bank has paid the check erroneously, but has not charged the drawer. Even under such circumstances the Louisiana and Ohio cases would seem to sustain the foregoing doctrine; but the case in Wallace is directly to the contrary..

*Estoppel. Promise of Bank Known to Payee before He Became Holder and Acted On*

(e) So also it has been held that if the bank makes an express promise to pay the checks of a certain depositor, which promise is communicated to a third party, who upon the strength of that promise receives such checks, parting with value therefor, then he may, as holder, maintain his action against the bank. The promise, having been brought to the knowledge of the payee (in this case by the statement made to him both by the drawer and by a director of a bank), creates a privity between the drawee and the payee which the court say would otherwise have been wanting.<sup>10</sup>

(f) As to the bank, it is clear justice that the assignment (M.) should have no effect until notice; for if a check (N.) subsequently drawn be presented before M. the bank must be protected in paying N.;<sup>11</sup> and so if a bank pays the money it holds to a receiver before

<sup>9</sup> Vanbibber v. Bank of Louisiana, 14 La. Ann. 481; Dodge v. National Exchange Bank, 20 Ohio St. 234; Seventh National Bank v. Cook, 73 Pa. St. 483; National Bank of the Republic v. Millard, 10 Wall. 152, 19 L. ed. 897.

<sup>10</sup> Nelson v. First National Bank, 48 Ill. 36.

<sup>11</sup> See Laclède Bank v. Schuler, 120 U. S. 511, 30 L. ed. 704, 7 Sup. Ct. 644; Harrison, Rec. v. Wright, 100 Ind. 515; Hawes v. Blackwell, 107 N. C. 201, 12 S. E. 245.

it has notice of a check against the fund, it is blameless, and the question lies between the holder and receiver. The equity is a secret one as to the bank until notice.

(g) A draft discounted for the whole of a debt, with the account of the debt attached, is held an assignment.<sup>12</sup> See (c).

(h) In England in case of the death of the drawer (revoking the banker's authority) the holder may have relief in equity against the bank.<sup>13</sup>

*Check not Drawn against Funds is No Assignment*

(i) On July 16, 1874, L. gave a note (due October 13) for \$225 to S. S. sold the note at once to the R. Bank. Sept. 16, 1874, L. deposited a draft on Bushy for \$292 with the R. Bank for collection; this was paid to the bank, Sept. 30. Sept. 26, L. made an assignment, for creditors. Sept. 29, L. gave H. a check on the R. Bank for \$280, dating the check prior to the assignment, viz., Sept. 22. H. took the check to the bank, and requested that it should be used to take up the note first mentioned. The bank attached the check to said note, and at maturity applied the Bushy money to its payment, knowing of the assignment, but not of the antedating of the check. The assignee in insolvency sued the bank for the whole of the Bushy money, and the bank claimed that the check was an absolute assignment, and, as the bank had no notice of the antedating, it must be protected. The court said there was no need to consider whether a check was an absolute assignment or not, *for in this case it was not drawn against funds. The Bushy money was by the act of the 26th assigned before it came into the hands of the bank, and therefore the assignee must recover.*<sup>14</sup>

(j) Even though a check may be an assignment, yet if the deposit is simply a credit given the depositor for unpaid drafts given in for collection, the holder cannot recover.<sup>15</sup>

(k) In case the bank on which a check is drawn becomes insolvent before the check is paid, of course the check-holder cannot expect a preference to the other creditors of the bank; in no reasonable view can the holder acquire more rights than the de-

<sup>12</sup> Moore v. Davis, 57 Mich. 255, 23 N. W. 800.

<sup>13</sup> Rodick v. Gandelle, 12 Beav. 325.

<sup>14</sup> Chaffee v. Bank, 40 Ohio St. 1.

<sup>15</sup> Jacob v. First National Bank, 3 Weekly Law Bull. (Ohio) 274, 5 Ohio Dec. 572.

positor would have himself. This is the essence of *Chapman v. White*.<sup>16</sup>

(l) If the money is deposited as the check-holder's, although in the drawer's name, and the fact is communicated to the bank before any other right attaches to the fund, it is in equity the money of the holder, and he may recover from the bank.<sup>17</sup>

§ 512. **The Bank as Trustee for the Holder of the Check or Bill.** — An effort has sometimes been made to compel the bank or banker to respond to the demand of the holder of a check or bill, on the ground that money has been specially paid in to the bank or banker, by the debtor, for this specific purpose. But the arguments for such plaintiffs have not been successful.

In New York a case arose as follows. A depositor having a small deposit in the bank sent additional funds for deposit, with the request that the amount should be credited to him on account, and that he should be charged with his note, which was to fall due, payable at the bank, on the following day. The bank received the deposit, gave the depositor credit for it, and then from the sum total of his credit deducted enough to pay an overdue note of his, in their possession, payable at their bank and charged to him. On the following day the note referred to by him in his instructions was presented for payment, and, his balance not being large enough to meet it, payment was refused. The court held that the holder of the note had no right of action against the bank, adopting the reasoning of the cases which deny the check-holder a right of action; viz., want of privity, and the fact that there was no assignment in law.<sup>1</sup> This case was distinguished from *Lawrence v. Fox*.<sup>2</sup> In that case the defendant (D.) received money from the debtor of the plaintiff (P.) for the purpose of paying P., and on an express promise to do so; but in this *Ætna* case the money was sent to be *credited to account*, and therefore became the property of the bank, and not that of the depositor held in trust; and the court said that whatever contract might exist between the bank and the depositor as to the payment of checks

<sup>16</sup> *Seld.* (N. Y.) 412. See also *Hawes v. Blackwell*, 107 N. C. 196, 12 S. E. 245.

<sup>17</sup> *Van Allen v. American National Bank*, 3 Lans. (N. Y.) 517 (1871). See *Hopkinson v. Forster*, L. R. 19 Eq. 74.

<sup>1</sup> § 512. *Ætna National Bank v. Fourth National Bank*, 46 N. Y. 82. See, for a somewhat similar case, but where the instrument was a check instead of a note, *First National Bank of Chicago v. Pettit*, 41 Ill. 492.

<sup>2</sup> 20 N. Y. 268.

or notes could not be taken advantage of by the holder, quoting *Chapman v. White*. An effort was made to bring the case under the principle that P. may sue on a promise made to D. for P.'s benefit; but the court remarked (p. 536) that in cases where that rule is applied there is always some trust, or the defendant has been charged for money which *ex æquo et bono* belongs to the plaintiff. It seems to us there was a trust here; the order of the depositor must be taken as a whole, and his fair meaning should be enforced.

In England a similar doctrine was asserted concerning a bill of exchange. The acceptor paid in the amount to his bankers in order to meet the bill, but upon the very day when the bill matured he died, and indebted to his bankers upon his general balance. The bankers refused payment. The drawers, having been forced to pay it, brought a bill in equity to compel the bankers to reimburse them, on the ground that they had received money in trust for the purpose of paying the draft. But the court dismissed the bill, on the ground of the want of privity between the plaintiff and defendants.<sup>3</sup> This case was avowedly decided on technical ground, authority and want of privity. The court remarked, that the bank had done wrong, and that the acceptor had a good cause of action, but that no agreement had been made by the bank with the drawers; they were not mentioned in the dealings with the bank, and the only way to make the bank a trustee and hold it accountable to the drawers would be to show that the money in the hands of the bank belonged to the drawers, which clearly was not the case, and therefore, "however strong the merits", there is no privity, and the bill must be dismissed, although the drawers "suffered by the conduct of the bank", and this conduct was "wrong."

One could scarcely imagine a clearer case for the building of an addition to the noble temple of equity than was offered to this judge. If all his predecessors had been as fearful of stepping out of the path worn by the feet of their ancestors, we should be dwelling in caves and eating raw fish. Here was conduct admittedly wrongful, detrimental to the interests of society, contrary to good faith, and a violation of that security and certainty in business transactions so essential to financial prosperity, and there was direct damage to an innocent party consequent upon this wrongful action. What more does equity need? talk of privity, it is a

<sup>3</sup> *Hill v. Royds*, L. R. 8 Eq. 290; *Moore v. Bushell*, 27 L. J. Ex. 3.

thing the law makes to order whenever occasion exists. Where would be all the law of implied contracts, if every judge had waited for some other to declare a privity in the case? Where would the many-headed action on the case be, if the judges of the earlier centuries had said, "There is a wrong here and damage resulting directly to P., and P. is not himself in fault, and the damage can be easily estimated, — it is a clear case *on the merits*, but there is no authority in the books holding a defendant liable in such a case and we cannot step out of doors" ? It is sorrowful to see men imprisoned in the past, and making the thoughts of former times their jailers.

**Cases denying that a Check-holder can Sue the Bank, or that a Check Operates as an Assignment, Legal or Equitable**

§ 513. **United States.** — "A bill of exchange or check is not an equitable assignment *pro tanto* of the funds of the drawer in the hands of the drawee."<sup>1</sup> The question of the check-holder's right of action is answered in the negative by the United States Supreme Court. We cite from the opinion of Justice Davis:<sup>2</sup> "As checks on bankers are in constant use, and have been adopted by the commercial world generally as a substitute for other modes of payment, it is important, for the security of all parties concerned, that there should be no mistake about the status which the holder of a check sustains toward the bank on which it is drawn. It is very clear that he can sue the drawer if payment is refused; but can he also, in such a state of the case, sue the bank? It is conceded that the depositor can bring assumpsit for the breach of the contract to honor his checks; and if the holder has a similar right, then the anomaly is presented of a right of action upon one promise, for the same thing, existing in two distinct persons at the same time. On principle, there can be no foundation for an action on the part of the holder, unless there is a privity of contract between him and the bank. How can there be such a privity, when the bank owes no duty, and is under no obligation to the holder? The holder takes the check on the credit of the drawer, in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the transaction. If it were true that there was a privity of contract between the banker and

<sup>1</sup> § 513. *Christmas v. Russell*, 14 Wall. 69, 20 L. ed. 762.

<sup>2</sup> *National Bank of the Republic v. Millard*, 10 Wall. 152, 19 L. ed. 897. See *Rosenthal v. Mastin Bank*, § 523.

holder when the check was given, the bank would be obliged to pay the check, although the drawer, before it was presented, had countermanded it, and although other checks, drawn after it was issued, but before payment of it was demanded, had exhausted the funds of the depositor. If such a result should follow the giving of checks, it is easy to see that bankers would be compelled to abandon altogether the business of keeping deposit accounts for their customers. If, then, the bank did not contract with the holder of the check to pay it at the time it was given, how can it be said that it owes any duty to the holder until the check is presented and accepted? The right of the depositor, as it was said by an eminent judge, is a *chose in action*, and his check does not transfer the debt, or give a lien upon it to a third person, without the assent of the depository. This is a well established principle of law, and is sustained by the English and American decisions. The few cases which assert a contrary doctrine, it would serve no useful purpose to review."

The "few cases" so contemptuously dismissed by his honor might not constitute a very weighty body of authorities; but it was certainly not a just comparison to speak of the one doctrine as "well established" and "sustained by English and American decisions", and of the other doctrine as bolstered up only by an insignificant array of opinions not worthy of notice. For the "few cases" were directly in point, while of the "English and American decisions", which the court cited as "sustaining" this "well established" doctrine, not a single one is *directly* a precedent: only two are very nearly in point, and of these two one is an English case treating of a bill of exchange; and still another is actually to the contrary purport, so far as it can be considered as bearing upon the question at all.

*If the Bank Accepts the Check, or Charges It against the Drawer,  
the Holder may Perhaps Sue*

The judge remarked, that the holder might have a right of action in case the bank had "charged the amount of the check against the drawer", on the principle *ex æquo et bono*. The bank, having communicated its assent to the drawer and taken the money, would hold it for the check-owner as money had and received to his use. And if the check were accepted by the bank, of course the holder could sue upon the acceptance.

§ 514. **United States Supreme Court.** — A check is at all events no assignment until notice of it is given to the bank, for until then other checks drawn afterward may be paid, or other assignments of the fund, or part of it may secure priority by giving prior notice. However the doctrine of equitable assignment “may operate to secure an equitable interest in the fund deposited in the bank to the credit of the drawer after notice to the bank of the check, or presentation to it for payment, — a question which we do not here decide, — we are of opinion that as to the bank itself, the holder of the fund, and its duties and obligations in regard to it, the bank remains unaffected by the execution of such a check until notice has been given to it, or demand made upon it for its payment. . . .

“In the case before us, it is a conceded fact, that, before the bank had any knowledge or notice whatever of the check on which the plaintiff brings this suit, it had received a distant notification from the drawer of that check that he had made a general assignment for the benefit of his creditors, with an express direction to hold the funds subject to the order of the assignee. Apart from this matter, it is not easy to see any valid reason why the assignment of an insolvent debtor for the equal benefit of all his creditors, and all his property, does not confer on those creditors an equity equal to that of the holder of an unpaid check upon his banker.”<sup>1</sup>

Any order, writing, or act which makes an appropriation of a fund, amounts to an equitable assignment of the fund. The reason is, that, the fund being a matter neither assignable at law nor capable of manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it is held good in a court of equity. As the assignee is generally entitled to all the remedies of the assignor, so he is subject to all the equities between the assignor and his debtor. But in order to perfect his title against the debtor, it is indispensable that the assignee should immediately give notice of the assignment to the debtor, or otherwise a priority of right may be obtained by a subsequent assignee, or the debt may be discharged by a payment to the assignee before such notice.<sup>2</sup>

§ 515. **Alabama.** — **Check on Bank or Debtor not Assignment of Funds in Hands of Drawee.** — A check, drawn and delivered

<sup>1</sup> § 514. *Laclede Bank v. Schuler*, 120 U. S. 511, 515, 30 L. ed. 704, 7 Sup. Ct. 744.

<sup>2</sup> *Spain v. Hamilton's Administrator*, 1 Wall. 604, 624, 17 L. ed. 619.



to the person to whose order it is payable, does not, without acceptance by the drawee, operate as an assignment of the sum in his hands for which it is given; it may be revoked by the drawer, at any time before acceptance, and is revoked by his death; and there being no privity, express or implied, between the payee and the drawee, the former can maintain no action on it against the latter.<sup>1</sup>

§ 516. **England.** — As a general rule, a check is not regarded as an assignment in England.<sup>1</sup>

§ 516 A. **Colorado.** — In Colorado the holder of a check cannot sue the drawee bank for refusal to pay upon presentation, even though the drawee has sufficient funds at the time and had told the holder before he purchased the check, that it was good.<sup>1</sup>

§ 517. **Indiana.** — In *Harrison, Rec., v. Wright*,<sup>1</sup> C. and D., holders of checks given by one bank (B.) upon another before B.'s insolvency, and dishonored because of the failure of B., sued in equity for a preference to the general creditors of B. The form of the check was: "Indianapolis, Ind., — —, 1883. No. —. Pay to the order of — —, — — dollars. — —, Cashier. To the United States National Bank, N. Y."

After an elaborate review of the cases, the court *held*, that "such a check, drawn upon the drawer's banker, without words of transfer, and drawn upon no particular designated fund, does not, of itself, either as between the drawer and drawee, or drawer and payee or holder of the check, operate as an appropriation, or equitable assignment of a fund in the hands of the drawee. Nor does it operate as an assignment of a part of the drawer's chose in action against the drawee, and hence the holder of such a check is not entitled to a preference as against the depositors and general creditors of an insolvent drawer."

The ground upon which the ruling was based is substantially stated in the following extracts (pp. 536, 537): "Strictly speaking, the depositary holds no fund to be appropriated. It owes a

<sup>1</sup> § 515. *National Commercial Bank v. Miller*, 77 Ala. 168.

<sup>1</sup> § 516. *Hopkinson v. Forster*, L. R. 19 Eq. 74.

<sup>1</sup> § 516 A. *Van Buskirk v. State Bank*, 35 Colo. 142, 83 Pac. 778 (1905).

<sup>1</sup> § 517. 100 Ind. 515. See also *National Bank of Rockville v. The Second National Bank of Lafayette*, 69 Ind. 480, in which the Massachusetts case of *National Bank v. Eliot Bank*, 20 Monthly Law Reporter (o. s.) 138, 10 Monthly Law Rep. (n. s.) 138, is approved, Abbott's dissent being rejected on the ground that, although an express promise to A. for C.'s benefit gives C. a right of action, this is not true of an *implied* promise.

debt. The right of the depositor is a chose in action. This or a part of it may be assigned. *When assigned, equity, for the purpose of making good the assignment, seizes upon the debt and calls it a fund.* An ordinary check, however, without words of transfer, and drawn upon no particular fund, does not effect such an assignment. In the absence of evidence, except what the check furnishes, it must be presumed that the payee takes the check upon the credit of the drawer. Many of the cases assert this, and it seems to us reasonable." The court denies the force of the assertion that there is no privity between the check-holder and drawee, and says that the objection made to allowing both drawer and holder an action against the drawee is not well taken, because the two actions are not for the same cause; denies that the uncertainty as to the holder or the amount of the check is any reason to prevent recovery by H. upon a promise made to D. for the benefit of H.; affirms that part of a chose in action may be assigned, and that a check may work an assignment if it contains words of transfer, or is drawn on a particular fund; and does not consider the objection well taken, that, if a check works an assignment, the drawee would be compelled to pay it although the fund were exhausted by subsequent checks, for until proper notice the equity is a secret one as to the bank. After thus knocking the props from under nearly all the cases upon its own side of the controversy, the court cannot see its way clear to allowing that the check-holder may recover, saying: "In the case before us, the checks contain no terms of transfer; they are not drawn upon any particular designated fund, nor is there anything in them, or the circumstances connected with the giving of any of them, that indicates any intention on the part of the drawers or payees that there should be an assignment of anything." How a judge of so clear, wide-reaching, and systematic intelligence could come to the conclusion of the last thirty words, is one of those ever-recurring mysteries in mental gymnastics, which have some other source than thought. In this case it would seem from some remarks of the judge that the real feeling underlying the decision was simply that the payees of the checks had given value, relying on the credit of the drawer bank, B.; the other creditors of B. had done the same; all these persons were equally innocent, and it seemed proper to put them on the same plane. "It is a case where equality among creditors is equity" (p. 544). And so long as the view is confined to the equity between the parties in

a particular case in the past, no note being taken of the effect of the decision upon the future of commercial life, there is some argument to be made for the ruling perhaps; but when a broader view is taken, and such a decision is sought as will most conduce to justice and social welfare in general, the same reason of security in commercial transactions that so greatly favors the despatch of business and the consequent increase of wealth, which applies to sustain transfers of bills and notes and other property, applies also to render a *bona fide* check-holder's title secure against insolvency of the drawer.

§ 518. **In Louisiana** a check is neither an equitable assignment nor a lien, nor has the check-holder any right of action against the drawee.<sup>1</sup>

§ 519. **Maryland.** — A check is not an assignment *pro tanto* until accepted or certified, and the bank cannot be held liable upon it by the payee.<sup>1</sup> The question in this case was between the bank (F.), in which the check on the C. bank was deposited, and the payee (P.), who endorsed it. The F. bank charged the check to the C., the latter refused to pay, and the F. recovered of P. It was not a question between the drawer and payee.

§ 520. **In Massachusetts**<sup>1</sup> the ruling of the United States Supreme Court was approved. An action by a check-holder was based in part upon a special agreement by the bank with the depositor to pay all checks that he might draw upon it to the extent of the fund deposited. It was held that the general agreement of the bank to pay all checks drawn upon it by the depositor could not be taken advantage of by the check-holders as a promise made for their benefit, because, when the promise was made, it was not known who the check-holders would be, nor the amount of the checks they might hold. The bank must have made a direct promise to the holder, by acceptance or otherwise, or the check must be drawn upon a designated fund, or for the whole debt. In other cases, it will be no assignment, legal or equitable.

§ 521. **In Michigan**<sup>1</sup> it was held that, without acceptance by the bank, or some special undertaking on its part, the bank could not be held liable upon a check, even though drawn for the full

<sup>1</sup> § 518. *Case v. Henderson*, 23 La. 49.

<sup>1</sup> § 519. *Moses v. Franklin Bank of Baltimore*, 34 Md. 574.

<sup>1</sup> § 520. *Carr v. National Security Bank*, 107 Mass. 45. See *National Bank v. Eliot Bank*, 20 Monthly Law Reporter (o. s.) 138, 10 Monthly Law Rep. (n. s.) 138.

<sup>1</sup> § 521. *Second National Bank v. Williams*, 13 Mich. 282.

amount of the deposit. But in a later case a draft discounted for the whole of a debt, with the account of the debt attached, was held an assignment.<sup>2</sup> A banker in Michigan sold a draft or check on a bank in New York, and before it was presented for payment made an assignment for the benefit of creditors. Payment was refused by the New York bank on account of the assignment. The action was by the payee of the check, to have the assignee pay the check in full, on the ground that, as between the drawer and payee, it operated as an equitable assignment. It was held by the court, Cooley, C. J., delivering the opinion (Sherwood dissenting), that the payee and holder of the check was not entitled to such preference.<sup>3</sup>

§ 522. **In the Missouri Appeals** it was several times decided that the holder could recover the amount of a check from the drawee bank which has refused payment, though having sufficient funds; <sup>1</sup> and in one case, the fact that suit was not brought on the check till after the drawee bank had settled its claim in bankruptcy against the drawer did not estop the holder.<sup>2</sup> In the Senter case, Justice Hayden says: "We are referred to what is said by Mr. Morse in the second edition of his work on Banking, to the effect that the denial of the holder's right to sue will probably hereafter become the doctrine generally accepted in this country. We are directly of the opposite opinion. The weight of reasoning, we think, is clearly in favor of the holder's right. The contrary doctrine is equivalent to a confession that the law is incompetent to extend well established principles to new cases, as the latter arise from new contracts created by commercial necessities." But when the question came before the Missouri Supreme Court, the authority of the United States Supreme Court was followed, and a check for *part* of the drawer's deposit was declared to be no assignment at law or in equity.<sup>3</sup>

§ 523. **Missouri.** — The Mastin Bank of Kansas City drew a check or draft upon a New York bank, and before it was presented for payment made an assignment for the benefit of creditors.

<sup>2</sup> Moore v. Davis, 57 Mich. 255, 23 N. W. 800.

<sup>3</sup> Grammel v. Carmer, 55 Mich. 201, 21 N. W. 418.

<sup>1</sup> § 522. McGrade v. German Savings Institution, 4 Mo. App. 330 (1877); Senter v. Continental Bank, 7 Mo. App. 532, 534.

<sup>2</sup> State Savings Association v. Boatman's Savings Bank, 11 Mo. App. 292 (1881).

<sup>3</sup> Merchants' National Bank v. Coates, 79 Mo. 169. And see Kellogg v. Citizens' Bank, 176 Mo. App. 288, 162 N. W. 643 (1914).

The assignee drew the funds from the New York bank. The action was against him to have the check paid in full, on the theory that the check worked an equitable assignment, and hence the assignee held the fund for the use of the holder of the checks. The decision was adverse to this claim, and was based upon the ground that the relation of the depositor and depository was that of creditor and debtor; and that the check was not for the whole of the fund, nor for any particular fund, and contained no terms of transfer, and hence, before acceptance, did not work an equitable assignment.<sup>1</sup> In a case that grew out of the failure of the same bank, and upon a state of facts in all essentials identical with the facts in the case last above, the same ruling was made by the United States Circuit Court in New York, by Blatchford, J.<sup>2</sup> In reference to these cases it is to be noted that the check in both instances was upon a New York bank. It would therefore be governed by New York law as to its effect, and the settled law of New York prevented the draft from being an assignment. This fact, although not decisive in the United States court upon a question of general commercial law, was yet of great weight.

§ 524. **New York.** — The case of *Chapman v. White*,<sup>1</sup> so often referred to by the cases denying that a check-holder may sue the drawee, or that it operates as an assignment, on close inspection affords no foundation for the structure built upon it. The facts were these. A. made his promissory note, payable at the C. bank on July 12. Shortly before this date he procured from the G. bank, which had a credit on account with the C. bank, a check upon the C. bank, which he forwarded to that bank for the purpose of meeting his note. The check came to the hands of the cashier at the C. bank, July 8. The C. bank failed, July 10. The note was presented there for payment, July 12, when payment was refused. The draft had not been indorsed by the cashier (L.), nor accepted by the bank. The court held that the cashier of the C. bank was the agent of A. for the purpose of procuring the payment of his note by means of this check; that *the circumstances of its receipt by the cashier* operated to effect no assignment of funds in the C. bank in favor of A., and that he had no preferred claim against its assets. In this case, not strictly the bank, *but the cashier, was the agent of A.* The loss fell wholly upon A. For

<sup>1</sup> § 523. *Dickinson v. Coates*, 79 Mo. 250.

<sup>2</sup> *Rosenthal v. Mastin Bank*, 17 Blatchf. 318.

<sup>1</sup> § 524. 2 Seld. (N. Y.) 412.

having bought a check from the G. bank, which was still good when it reached the C. bank, he could not of course look to the G. bank for any reimbursement. He took the risk of the solvency of the C. bank during the interval which must elapse before his note ought to have been presented, and also of the accuracy and honesty of the conduct of that bank, or of its cashier, in appropriating the check, or the credit or proceeds which he was entitled to thereupon, to the payment of his note. A miscarriage in any of these risks was his individual loss. These facts do not touch the question of assignment between drawer and payee, nor the question of the holder's right to sue for an improper refusal to pay a check. The money was on general deposit, and A. fared just as well as the drawer himself could have done. As against the other depositors in and creditors of the C. bank, neither the drawer nor his assignee could have any just claim to preference. The fund could not be changed from a general deposit to a specific or trust deposit until notice had been brought home to the bank, and this had not been done by L.; and his notice was not that of the bank, for it was his own case. He was acting as A.'s agent in the matter, not the bank's agent, and even if his notice were held that of the bank, A. would in no proper view have a superior equity. The note was not presented till after the failure.

When we look closely at these facts, and then at the long line of cases tracing their pedigree from it where a check has been ruled to be no assignment between drawer and payee in case of *insolvency, not of the drawee bank, as here, but of the drawer*, and when proper presentment had been made, we are reminded that children are sometimes very unlike their parents; and when we look at that other group of legal opinions in which *Chapman v. White* is quoted as a basis for ruling that a check-holder cannot sue the drawee for improperly refusing to pay a check although it has sufficient funds, we cannot sing, "How firm a foundation!" However, upon the authority of other cases, there is no doubt that New York refuses to recognize a check as an assignment between drawer and payee, or as sufficient to give any preference against the general creditors of the drawer.<sup>2</sup>

In the *Risley* case it was held that, although a check is not of *itself* an assignment, not being the contract between the parties,

<sup>2</sup> *People v. Merchants', etc., Bank*, 78 N. Y. 269; *Ætna National Bank v. Fourth National Bank*, 46 N. Y. 82; *Risley v. Phoenix Bank*, 83 N. Y. 318. See also *Winter v. Drury*, 1 Seld. (N. Y.) 525.

but only a convenient means of carrying out the transfer that may be contemplated, yet since *a debt or a part of it can be orally assigned by an agreement on consideration*, on this ground an assignee may sue in his own name; but such assignment must be proved by some evidence beyond that of possession of a check.

A bill of exchange was drawn by a bank on one who had funds to meet it. The bank becoming insolvent, the holder was held to have no right to preference over the other creditors.<sup>3</sup>

§ 525. **New Jersey.**—The holder of a check cannot sue the bank for refusal to pay upon its presentation, though the drawer has sufficient unincumbered funds on deposit at the time of refusal.<sup>1</sup>

§ 526. **In Pennsylvania,**<sup>1</sup> it was held that a check upon a banker is not of itself an appropriation of the funds in his hands belonging to the drawer, unless it plainly appears that the fund claimed was the one designated, out of which payment was to be made.

The holder of a check cannot maintain an action against the drawee for refusal to accept, nor for refusal to pay an unaccepted check.<sup>2</sup> But when a depositor in settling his account with the bank leaves the exact amount of an outstanding check expressly for its payment the bank is liable to the holder upon these facts as an implied acceptance.<sup>3</sup>

§ 527. **In Tennessee,** the Supreme Court<sup>1</sup> approves of the ruling in *Bank of the Republic v. Millard*.<sup>2</sup>

§ 527 A. **In Texas,** there is no doubt that the holder of an unaccepted check cannot maintain an action thereon against the bank.<sup>1</sup>

#### **Cases affirming the Check-holder's Right to sue the Drawee Bank, or Announcing the Principles upon which that Doctrine Rests**

§ 528. **United States.**—The case of *Mandeville v. Welsh*<sup>1</sup> is frequently, but, as it seems, not altogether properly, cited among the authorities which are opposed to the check-holder's right to

<sup>3</sup> *Justh v. National Bank*, 56 N. Y. 478.

<sup>1</sup> § 525. *Creveling v. Bloomsburg National Bank*, 46 N. J. L. 255.

<sup>1</sup> § 526. *Loyd v. McCaffrey*, 46 Pa. St. 410.

<sup>2</sup> *First National Bank of Northumberland v. McMichael*, 106 Pa. St. 460; *Saylor v. Bushong*, 100 Pa. St. 23. See § 535.

<sup>3</sup> *Saylor v. Bushong*, 100 Pa. St. 23.

<sup>1</sup> § 527. *Planters' Bank v. Merritt*, 7 Heisk. (Tenn.) 177.

<sup>2</sup> See *Roberts v. Corbin*, 26 Iowa 315 (a poor opinion, but putting this point very clearly).

<sup>1</sup> § 527 A. *New York Life Ins. Co. v. Patterson*, 35 Tex. Civ. App. 447, 80 S. W. 1058 (1904).

<sup>1</sup> § 528. 5 Wheat. 286, 5 L. ed. 87.

sue. For it is in this very case that the court touches for the first time the keynote of the true contrary doctrine. The learned judge is not speaking of checks, but of bills of exchange, and is discussing the point whether the bill is an assignment of the funds in the hands of the drawee prior to his acceptance of it. He is clearly of opinion, equally on the abstract principle and the recognized authorities, that the bill does not operate as such an assignment, a doctrine which must now be assumed to be established law. The chain of his legal reasoning is as follows. Where an order is for the whole of a particular fund, it is an equitable assignment thereof, and after notice to the drawee it binds the fund in his hands. But where it is drawn either on a general or a particular fund, for a part only, as was the fact in the case under consideration, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he accepts, or *unless an "obligation to accept may be fairly implied from the custom of trade, or the course of business between the parties, as a part of their contract."* The reason, he adds, is plain. A creditor cannot split up one cause of action into many. A debtor undertaking to pay an integral sum to one person cannot be obliged to pay in fractions to other persons. It is worthy of note that the "reason" adduced by the learned judge, and which is not anywhere stated or indirectly implied by him to be applicable to checks, is evidently not applicable to them. A depositor *has* an undeniable right to draw any number of checks he may choose against the balance; and it is also undeniable that he may bring his separate suit for damages upon each one separately for the refusal of the bank to pay it on demand. Moreover the obligation of the bank is only to pay the checks *upon presentment and demand*; it is therefore liable to no action until it has wrongfully refused to pay; and it is only liable to actions by several different plaintiffs when it has, by several different refusals, been guilty of several different wrongful acts. Plainly, therefore, checks are at least taken out of the *reason* which is the basis of the proposition laid down as governing bills of exchange. But the exception, expressly made by the judge, of paper upon which the obligation of the drawee to pay may arise as matter of law, from an *implied* contract growing out of the usage of trade or the custom of dealing between the parties, seems to have been inserted for the express purpose of leaving open the door for putting a different construction upon precisely such instruments as ordinary bank checks.



The "implied" contract, if any, must arise from the well-known usages of the banking business. An incorporated bank, having received certain peculiar privileges from the community, owes in return to the community certain reciprocal duties. It may be fairly held to undertake with the community to conduct its business according to the well-known, established, universal customs of the banking business; and this undertaking with the community at large is an undertaking with each individual in the community; for breach of which, as towards any individual, that individual ought to have a right of action. It is the duty of the bank to pay a good check to the holder when there are funds of the drawer which should properly be appropriated to that purpose. The duty is not denied, and the drawer may have his action for breach of it; and this is by virtue of the contract between himself and the bank. But the breach of duty is also a wrong done to the check-holder; and why should not he have his right of action, not by virtue of an express contract, but by virtue of the general obligation which the chartered bank owes to the public at large and to each member thereof? In this point of view the analogy between the bill of exchange drawn on the merchant and the check drawn on the *quasi* public corporation evidently fails.

The accurate and careful saving of this exception by Judge Story was quite too significant to escape notice.

§ 529. **England.** — Baron Martin says, "There is no doubt that the bearer of a check is entitled to receive the money; . . . whoever has possession of it as bearer<sup>1</sup> may maintain an action upon it." In this case there were two instruments sued on; one was a bill of exchange, but the other was an ordinary bank check. Judge Sharswood, in his note to page \*21 of his edition of Byles on Bills, says, that it might perhaps be inferred that a check duly presented (*i.e.*, of course, for payment) becomes an appropriation of so much of the drawer's funds in the banker's hands, and that if payment be subsequently stopped and all the drawer's funds withdrawn, the bank remains still liable to the holder. He

<sup>1</sup> § 529. *Ancona v. Marks*, 7 Hurl. & N. 686 (1862). All English checks were at that time, by statute, required to be drawn payable to bearer (or to A. or bearer, which was the same thing in law). A check payable to the order of any person named was, by express provision of statute, subject to be stamped as an inland bill of exchange. This law has, however, since been changed, and checks may now in England be drawn payable to order without other stamps than those used on a check payable to bearer.

acknowledges, on the strength of *Bullard v. Randall*, *supra*, that this seems to be still unsettled. But he adds as his own view, that, though the rule does not govern bills of exchange, yet they are not held to be an equitable assignment or appropriation of the sum drawn for, whereas a bank check is so considered; and if the holder be one for value, against whom the drawer cannot rightfully revoke, why then should not the banker, upon distinct claim and notice, be held bound by the equity?

Mr. Grant in his work at first laid down the rule, on the strength of *Ancona v. Marks*, *supra*, that the holder of a check payable to bearer, or of a check payable to order and indorsed in blank, had a right of action against the bank. But in his edition of 1873 (p. 106) he modifies this doctrine, by saying that the holder cannot sue the bankers in the absence of proof that the check has been accepted by the bankers or charged against the drawer. His sole authority for this statement is *National Bank of the Republic v. Millard*, *supra*, from which he quotes in a foot-note, and adds that the argument to the contrary effect, made in the first edition of this book, is "artificial."

In *Keene v. Beard*, Byles, J., said: "In one thing a check differs from a bill of exchange; it is an appropriation of so much money of the drawer's in the hands of the banker on whom it is drawn, for the purpose of discharging a debt or liability of the drawer to a third person; whereas it is not necessary that there should be money of the drawer in the hands of the drawee of a bill of exchange." <sup>2</sup>

§ 530. *Illinois*. — The case of *Munn v. Burch*<sup>1</sup> was an action by a check-holder against the bank upon which it was drawn. It was held that he could recover, and that upon *presentation of the check, both the legal and equitable right to the money of the drawer in the hands of the bank passed to him*. In the course of the opinion it was said, that upon receiving the deposit the bank impliedly agrees with the depositor to pay it out, on the presentation of his checks, in such sums as those checks may call for, "and with the whole world he agrees that whoever shall become the owner of such check shall, upon presentation, thereby become the owner, and entitled to receive the amount called for by the check, provided the drawer shall at that time have that amount on deposit." It is said further, "Surely every sound lawyer will at once perceive a privity of contract between the banker and the holder of the check, created by the implied promise held out to the

<sup>2</sup> *Keene v. Beard*, 8 C. B. (N. S.) 372.

<sup>1</sup> § 530. 25 Ill. 35.

world by the banker, on one side, and the receiving of the check for value and presenting it, on the other." A later case in the same State says that the banker "agrees with the whole world" that the owner of a check which the banker is in duty bound to honor "shall upon its presentation thereby become the owner of and entitled to receive the amount specified"; also that, when a good check is presented at the bank, the banker "becomes the holder of the money by the use of the owner of the check, and is bound to account to him for that amount."<sup>2</sup> And other cases affirm the doctrine.<sup>3</sup>

The drawer cannot countermand a check after it has passed to a *bona fide* holder. Upon presentation the holder becomes the legal owner of the deposit to the amount of the check, if the unincumbered funds are sufficient. And it is no defence to the bank that previous to presentment the drawer has ordered it not to pay the check.<sup>4</sup>

A check drawn in Indiana upon a bank in Illinois is to be construed by Illinois law, and will operate as a transfer of the sum named, regardless of the Indiana rule. (See § 12, 7.) The fact that, just before garnishment of the bank in a suit against a depositor, the latter drew a check in favor of the cashier is not, of itself, evidence of want of good faith, and a bank paying a check *drawn* before the service of garnishment, although not presented till after the service, is protected, for the check is an immediate assignment. Otherwise, as to a check *drawn after the service*.<sup>5</sup>

Since the adoption of the Negotiable Instruments Act of June 5, 1907, a bank is not liable, in any case, to the holder of a check drawn on it, before it accepts or certifies the check.<sup>6</sup>

§ 531. Iowa distinguishes a check from other bills of exchange, and gives the holder a right to recover from the drawee after presentment, on substantially the same grounds as in Illinois.<sup>1</sup>

<sup>2</sup> Bickford v. First National Bank of Chicago, 42 Ill. 238; and see Rounds v. Smith, *id.*, 245; Brown v. Leckie, 43 *id.*, 497.

<sup>3</sup> Chicago Marine & Fire Ins. Co. v. Stanford, 28 Ill. 168. So also in Fourth National Bank of Chicago v. City National Bank of Grand Rapids, 68 Ill. 398; Merchants' National Bank v. Ritzing, 20 Brad. App. (Ill.) 29 (1886).

<sup>4</sup> Union National Bank v. Oceana Co. Bank, 80 Ill. 212 (1875). See Hamilton National Bank v. Franklin, 140 Ill. App. 608 (1908).

<sup>5</sup> National Bank of America v. Indiana Banking Co., 114 Ill. 483, 2 N. E. 401 (1885).

<sup>6</sup> Rauch v. Bankers' National Bank, 143 Ill. App. 625 (1908).

<sup>1</sup> § 531. Roberts v. Corbin, 26 Iowa 315. And the holder may sue

§ 532. **In Kentucky** it has been held<sup>1</sup> that the payee of a check drawn in Kentucky upon a bank in New York could maintain an action against the bank upon the ground that the check operated as an absolute appropriation of so much money in the hands of the drawee. The reasoning of the court seems to place a bank check upon the same basis as an order drawn upon a particular fund in the hands of the drawee.

§ 532 A. **In Minnesota** when a check is paid to one not authorized to receive payment and the bank charges the sum so paid to the account of the drawer who acquiesces in such charge, a right of action against the bank accrues in favor of the payee, in the absence of any act or omission on his part which would excuse such payment by the bank, or deprive him of such right of action.<sup>1</sup>

§ 533. **New York.** — In the case of *Harris v. Clark*,<sup>1</sup> decided in New York in 1849, the court recognized the doctrine laid down in *Mandeville v. Welch* as bound in its application to bills of exchange; but, at the same time availing itself of the exception, said that the rule might not be so reasonably applied to matters of checks, which are practically equivalent to a transfer of actual cash. They are plausible, if not solid, reasons for saying that a check works a transfer *from the time of presentment for payment*, owing to the understanding of all the parties, and to the usual course of business. The same cannot be predicated of bills of exchange, which are not so equivalent to cash, and which are not expected to be paid on the spot, immediately on demand, like checks.

§ 534. **In Ohio**, a check is an absolute transfer,<sup>1</sup> but not of course, unless drawn against funds.<sup>2</sup>

even though the bank claims not to have the money. *Bloom v. Winthrop State Bank*, 121 Iowa 101, 96 N. W. 733 (1903).

<sup>1</sup> § 532. *Lester & Co. v. Given, Jones & Co.*, 8 Bush (Ky.) 357. See also *Weinstock v. Bellwood*, 12 Bush (Ky.) 139; *Columbia etc. Co. v. First National Bank*, 116 Ky. 364, 76 S. W. 156 (1903); and it is immaterial that the bank claimed not to have the money on hand when the check was drawn.

<sup>1</sup> § 532 A. *McFadden v. Follrath*, 114 Minn. 85, 130 N. W. 542, 37 L. R. A. (N. S.) 201, n. (1911), citing *William Deering & Co. v. Kelso*, 74 Minn. 41, 76 N. W. 792, 73 Am. St. Rep. 324; *Dispatch Printing Co. v. National Bank of Commerce*, 109 Minn. 440, 124 N. W. 236; *Columbia Mill Co. v. National Bank of Commerce*, 52 Minn. 224, 53 N. W. 1061.

<sup>1</sup> § 533. 3 Comst. (N. Y.) 93.

<sup>1</sup> § 534. *Morrison v. Bailey & Burgess*, 5 Ohio St. 15; *Dodge v. Bank*, 20 Ohio St. 246.

<sup>2</sup> *Chaffee v. First National Bank of Ravenna*, 40 Ohio St. 1.

§ 534 A. **In Oklahoma** when a check is drawn for the amount of a fund that a trustee had deposited to pay for land and the bank writes "escrow" thereon and delivers it to the cashier pending completion of the sale, there is no equitable assignment of the fund enabling the payee of the check to recover.<sup>1</sup>

§ 535. **Pennsylvania.** — The common sense of the holder's right to sue the bank is well expressed by Judge Trunkey:<sup>1</sup> "If the check has not been revoked, by common usage the holder expects it will be paid on presentment. He may suffer a real injury by refusal, for which he may be without redress, as in case of the drawer becoming insolvent before recourse to him could be effectual. It would seem that the holder ought to have a remedy against the bank for a wrongful refusal of payment arising from an implied promise from the usages of business, or the course of dealing between the parties. If the bank, in violation of its duty, dishonors a check, the holder may be injured quite as much as the drawer, and the bank ought to be answerable to each party injured by breach of the contract."

§ 536. **South Carolina and Louisiana.** — It was said in *Fogarties v. State Bank*,<sup>1</sup> that the holder of a check had a right of action in assumpsit against the bank, if it refused to pay the check when it had funds of the drawer available for doing so, *upon the implied promise which the law raises in his behalf*. The idea would have been more satisfactorily expressed if it had been intimated that the law raised this implied promise only from the usage or course of dealing of the parties, or of the community generally. Perhaps the court thought this ground of its ruling to be clear enough without specific exposition; certainly no other basis readily suggests itself, and the logical sequence may be assumed to be obvious. It was further asserted that this was true *especially* where the bank charter stipulated that the bank should "receive money on deposit, and pay away the same to order free of expense." It was hardly worth while for the learned justices to bring forward so insignificant a prop. They had taken a ground that was either tenable without this, or else could not be made tenable at all. The language, directing the bank to do only what every bank that ever existed must do as a part of the most simple and ordinary

<sup>1</sup> § 534 A. *Walters National Bank v. Bantock*, 41 Okla. 153, 137 Pac. 717, 1915C. L. R. A. 531.

<sup>1</sup> § 535. *Saylor v. Bushong*, 100 Pa. St. 23.

<sup>1</sup> § 536. 12 Rich. Law (S. C.) 518.

phase of banking business, — language expressing only what would be regarded as implied in all charters without any distinct expression at all, — could hardly have any such powerful alternative effect upon the ordinary rights of check-holders as to confer upon them the right of suit. A similar view is implied, though not directly laid down, in *Vanbibber v. Bank of Louisiana*.<sup>2</sup>

§ 537. **Wisconsin.** — D. gave P. a check on a bank which held sufficient funds; before presentment suit was brought to dissolve the D. firm and a receiver was appointed. The bank, hearing of this, refused payment, and P. sued the receiver in equity for the amount of the check. The court held that the check was an equitable assignment, as between the drawer and payee the drawer could not arbitrarily stop its payment, and that the receiver stood in the drawer's shoes, and could not have any greater right against the payee than the drawer had.<sup>1</sup>

§ 538. **Miscellaneous.** — A check is an absolute appropriation by the depositor of so much in the hands of his banker to the holder, and there it should remain until called for.<sup>1</sup> A bill of exchange for a part of the funds in the hands of the drawee is an assignment without acceptance, and the holder can sue the drawee.<sup>2</sup> Of course, a bill of exchange is not generally an assignment, it is not necessary that it should be drawn against funds, and even if it is, the drawee has not, like a banker, engaged to pay out money in parcels as may suit the drawer.<sup>2</sup> An order of a landlord

<sup>2</sup> 14 La. Ann. 481.

In *Loan & Savings Bank v. Farmers' etc. Bank*, 74 S. C. 210, 54 S. E. 364, 114 Am. St. Rep. 991 (1906), the court held that the drawer of a check cannot countermand payment of a check after it has come into the hands of a *bona fide* holder, even though it was obtained by fraud or without consideration.

A bank is liable to the holder of a second check given to the same payee as the payee of the first check, and of the same amount, which bears on its face "if previous check of \$500 dated March 9th is still unpaid", when the drawer has on deposit sufficient funds to pay both checks and the first was outstanding. *Southern Seating etc. Co. v. First National Bank*, 87 S. C. 79, 68 S. E. 962, 29 L. R. A. (N. S.) 623, n. (1908).

<sup>1</sup> § 537. *Pease v. Landauer*, 63 Wis. 20, 22 N. 847 (1885). See *Raesser v. National Exch. Bank*, 112 Wis. 591, 88 N. W. 618, 88 Am. St. Rep. 979, 54 L. R. A. 174 (1902), holding that since the adoption of the Negotiable Instruments Law a bank is not liable to the holder of a check until it accepts or certifies it.

<sup>2</sup> § 538. 4 Kent 549; *Brown v. Lusk*, 4 Yerg. (Tenn.) 210; *Morrison v. Bailey*, 5 Ohio St. 13; *Hoyt v. Seeley*, 18 Conn. 353; *Farmers' Bank v. Trust Co.*, 31 S. W. 38.

<sup>2</sup> *Corser v. Craig*, 1 Wash. (C. C.) 424.

on a tenant to pay the rent accruing for a time certain to B. was held an equitable assignment, and, after notice to the tenant, he must pay, according to the order, whether he had accepted or not.<sup>3</sup> An order for part of a fund is an assignment, and after notice the agent parts with it at his peril.<sup>4</sup>

**Authority for Holding that a Check is at least an Equitable Assignment between Drawer and Payee**

§ 539. **United States.** — The Mastin Bank made an assignment to Coates, after having issued and delivered a “draft” upon its depository in New York. Before the “draft” was presented for payment, Coates withdrew the deposit from the New York bank. As between the assignee and payee, Mr. Justice Miller held that the “draft” was in law and fact a check, and that, while a deposit of money in a bank creates a debt on the part of the bank, it is a fund deposited to the credit of the depositor, and that the check operated as an appropriation or equitable assignment, *pro tanto*, of the fund to the holder, and that thus far the fund did not pass to the assignee.<sup>1</sup> In an action to have a check paid in full from the estate of a bankrupt drawer, it was held in the Matter of Brown,<sup>2</sup> in bankruptcy, that the holder was entitled to this, on the ground that a check is an instrument *sui generis*, and is to be construed exactly as the parties intend it; that the check, of itself, is an appropriation of the fund in the hands of the drawee, and that, consequently, the drawer has no right to withdraw the funds after giving the check.

§ 540. **Ohio.** — In *Gardner v. National City Bank*,<sup>1</sup> a party wishing money procured it by giving his check to a bank in Ohio upon a bank in Philadelphia for the full amount of his deposit in the latter bank. Before the check was presented, the Philadelphia bank remitted to the drawer by a certified check. He deposited this in another bank in Ohio as cash, and it was afterward paid. After making subsequent deposits in this bank, and checking out various sums from time to time, the drawer made an assignment for the benefit of creditors. The assignee and all interested parties were brought before the court by an application

<sup>3</sup> *Morton v. Naylor*, 1 Hill (N. Y.) 583.

<sup>4</sup> *Peyton v. Hallett*, 1 Caines (N. Y.) 28.

<sup>1</sup> § 539. *First National Bank of Cincinnati v. Coates*, per Miller, J., 3 McCrary 9.

<sup>2</sup> 2 Story (C. C.) 502 (1843).

<sup>1</sup> § 540. 39 Ohio St. 600.

on part of the payee of the check to have it paid in full. The court *distinguished the case from one between the payee and drawee, or where the check is for less than the whole fund drawn upon*, and held that, as between the drawer and payee, it was the manifest intention of the parties to transfer the absolute right to receive the amount from the drawee, and that the draft should operate as an equitable assignment of the funds in the hands of the drawee; that it did operate as such assignment, and that, when the drawer received the amount from the drawee, it in equity belonged to the payee.

§ 541. In the *German Savings Institute v. Adae*, the court said that, as the question was not between the drawee and the holder, but only between the holder and the assignee of the drawer in insolvency, their opinion was that the check-holder had the better equity.<sup>1</sup> In the United States Circuit Court, Judge Miller decided in the same way in *First National Bank v. Coates*.<sup>2</sup> An order against a city upon funds due the drawer makes the city liable to the holder to the amount unpaid and owing to the drawer.<sup>3</sup> "In equity an order given by a debtor to his creditor, upon a third person having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund."<sup>4</sup> So a check on a particular fund is an assignment in equity, and anything which indicates the intent to make an absolute transfer is sufficient.<sup>5</sup>

§ 542. **Effect of a Check as depending on the Law of Place.** — If in the State where a check is drawn it is regarded as an assignment, legal or equitable, as between the holder and the drawer or his assignee for creditors coming afterward into possession of the deposit, such will be its effect, no matter where the check is payable; as where a check was drawn in Ohio the day before the drawer assigned for the benefit of creditors, the law of Ohio was applied, and the holder of the check preferred in a suit against the assignee, who had received the deposit, without regard to the

<sup>1</sup> § 541. *German Savings Institute v. Adae*, 8 Fed. 106.

<sup>2</sup> 8 Fed. 540.

<sup>3</sup> *Hall v. City of Buffalo*, 1 Keyes (N. Y.) 193; *Ballou v. Boland*, 14 Hun (N. Y.) 355.

<sup>4</sup> *Burn v. Carvalho*, 4 My. & C. 690; *Rodick v. Gandell*, 1 De Gex, M. & G. 763.

<sup>5</sup> *McWilliams v. Webb*, 32 Iowa 577; *Moore v. Lowrey*, 25 Iowa 336; *First National Bank v. D. S. Ry. Co.*, 52 Iowa 378, 3 N. W. 395; *County of Des Moines v. Hinkley*, 62 Iowa 637.



law of the State where the instrument was payable.<sup>1</sup> But the effect of a check on the deposit so long as it is in the hands of the bank is governed by the law of the *locus* of the bank, *i.e.*, the place of performance of the contract.<sup>2</sup> A check drawn in Indiana on an Illinois bank is an immediate transfer, while a check drawn in Illinois on an Indiana or New York <sup>2a</sup> bank is not a transfer until acceptance, except as against the drawer and his creditors, in cases like the above, where the deposit was paid over to the assignee, and had to be distributed according to the equities of the law of the drawer's *locus*.

§ 543. **Effect of Check as Payment.**<sup>1</sup>—The mere giving of a check is not payment of the debt; <sup>10</sup> it is an executory order and is revocable before payment.<sup>1a</sup>

The presumption is that a check is only intended as conditional payment,<sup>1b</sup> and if dishonored,<sup>1c</sup> and the holder is not guilty of laches,<sup>1d</sup> causing loss to the drawer, the latter is liable upon the

<sup>1</sup> § 542. *Davis v. Adae*, 4 Weekly Law Bull. (Ohio) 395, 7 Ohio Dec. 620.

<sup>2</sup> *Andrews v. Bond*, 13 Pet. 65, 10 L. ed. 61; *National Bank of America v. Indiana Banking Co.*, 114 Ill. 483, 2 N. E. 401; *Dreyfuss v. Adae*, 4 Weekly Law Bull. (Ohio) 671, 7 Ohio Dec. 648.

<sup>2a</sup> *Abt v. American Trust and Savings Bank*, 159 Ill. 467, 42 N. E. 856.

<sup>1</sup> § 543. See payment by certificate of deposit, §§ 304, 305; by bank bills, § 637.

<sup>10</sup> *Holland v. Mutual Fertilizer Co.*, 8 Ga. App. 714, 70 S. E. 151 (1911).

<sup>1a</sup> *Carroll Exchange Bank v. First National Bank*, 58 Mo. App. 17; *Born v. First National Bank*, 123 Ind. 78, 24 S. E. 173; *Weiland's Adm's v. State National Bank*, 112 Ky. 310, 65 S. W. 617, 56 L. R. A. 178 (1901).

The drawer may countermand the payment of a check, but he can exercise this right only at his own risk. *Parker-Fain Co. v. Orr*, 1 Ga. App. 628, 57 S. E. 1074 (1907). By its exercise he cannot affect the validity of a check unless procured from him by fraud or mistake, and he cannot affect it at all in the hands of an innocent holder for value. Before the check has been delivered and while it remains in the custody of the drawer, it may be revoked. *Watt-Harley-Holmes Co. v. Day*, 1 Ga. App. 646, 57 S. E. 1033 (1907).

<sup>1b</sup> *Johnson Brinkman Co. v. Central Bank*, 116 Mo. 558, 22 S. W. 813; *Holmes v. Briggs*, 131 Pa. St. 223, 18 Atl. 928; *Dille v. White*, 132 Iowa 327, 109 N. W. 909 (1906); *Union Biscuit Co. v. Springfield Grocer Co.*, 143 Mo. App. 300, 126 S. W. 996 (1910); *Baughman v. Lowe*, 41 Ind. App. 1, 83 N. E. 255 (1907); *First National Bank v. McConnell*, 103 Minn. 340, 114 N. W. 1129, 123 Am. St. Rep. 336, 14 L. R. A. (N. S.) 616 (1908); *McFadden v. Follrath*, 114 Minn. 85, 130 N. W. 542, 37 L. R. A. (N. S.) 201, n. (1911).

<sup>1c</sup> Stopping payment is equivalent to dishonor, *Usher v. Tucker*, 217 Mass. 441, 105 N. E. 360 (1913).

<sup>1d</sup> The acceptance of a check imposes upon the payee the duty of exercising due diligence to realize upon it so as to escape responsibility for

original cause, or debt for which the check was given.<sup>2</sup> By agreement a check may be taken as absolute payment, and the drawer will then be liable only as an indorser, and not on the original debt.<sup>3</sup> And a check is always so far payment until dishonored, that, after its delivery, the drawer cannot be garnisheed as debtor of the payee in respect to the debt for which the check is given.<sup>4</sup> Any laches of the holder discharges the drawer on the original debt so far as he is injured by it, and loss of the check by holder, whether negligent or not, has the same effect.<sup>5</sup> It may be shown by parol that a check is a loan, and not a payment of a debt.<sup>6</sup>

§ 544. **Check is presumed to be only Conditional Payment.** — W., a debtor, caused the C. bank, as his agent, to transmit to N., his creditor, a draft of the C. on a New York bank. The draft was without delay forwarded for collection, whereupon N. forwarded to W. the account marked, "Paid April 8, 1881", and signed by N. The draft was protested, and the C. bank failed. *Held*, that W.'s original debt to N. was not extinguished.<sup>1</sup> The Georgia Code, § 2867, to the effect that a bank check is not payment till it is itself paid, merely expresses the previous common law.<sup>2</sup> One who receives a check acts as agent of the debtor in making the collection,<sup>3</sup> and if not negligent he may recover on the original debt, in case the check is not paid.<sup>4</sup> A check is not payment until paid,<sup>5</sup> even though the drawer has funds,<sup>6</sup> and though the check is given for a note that is surrendered,<sup>7</sup> or in payment of a former check,<sup>8</sup> except in cases where it is positively agreed

loss if, in the meantime, the drawer should become insolvent. *Noble v. Doughten*, 72 Kan. 336, 83 Pac. 1048, 3 L. R. A. (N. s.) 1167, n. (1905).

<sup>2</sup> § 544.      <sup>3</sup> § 546.      <sup>4</sup> § 545.      <sup>5</sup> § 546.      <sup>6</sup> § 547.

<sup>1</sup> § 544. *Weaver v. Hixon*, 69 Ga. 699 (1882); *Thomas v. Supervisors*, 115 N. Y. 47, 21 N. E. 674; *National Bank v. Chicago, B., and N. R. Co.*, 44 Minn. 224, 46 N. W. 342, 560.

<sup>2</sup> *Phillips v. Bullard*, 58 Ga. 256 (1877).

<sup>3</sup> *Kobbi v. Underhill*, 3 Sand. Ch. (N. Y.) 277.

<sup>4</sup> *Cromwell v. Lovett*, 1 Hall (N. Y.) 56. See *Petrue v. Wakern*, 99 Ill. App. 463 (1902).

<sup>5</sup> *Marrett v. Brackett*, 60 Me. 527; *Burkhalter v. Second National Bank*, 42 N. Y. 538; *Taylor v. Wilson*, 11 Met. (Mass.) 44; *Kermeyer v. Newby*, 14 Kan. 164; *Mordis v. Kennedy*, 23 Kan. 408; *Noble v. Doughten*, 72 Kan. 336, 83 Pac. 1048, 3 L. R. A. (N. s.) 1167, n. (1905); *First National Bank v. McConnell*, 103 Minn. 340, 114 N. W. 1129, 123 Am. St. Rep. 336 (1908); *McFadden v. Follrath*, 114 Minn. 85, 130 N. W. 542, 37 L. R. A. (N. s.) 201, n. (1911).

<sup>6</sup> *Everett v. Collins*, 2 Camp. 515; *Porter v. Talcott*, 1 Cow. (N. Y.) 359.

<sup>7</sup> *Olcott v. Rathbone*, 5 Wend. (N. Y.) 490.

<sup>8</sup> *Kelty v. Second National Bank*, 52 Barb. (N. Y.) 328.

to be received in absolute payment.<sup>9</sup> When goods are bought and paid for by check of the buyer, or of a third party, and the check or other security given for the price turns out to be of no value, it may be treated as a nullity, and an action will lie for the price.<sup>10</sup>

But when a check has been given in the usual course of business to the authorized agent of the payee and such agent indorses the check and receives the money therefor, and the bank charges the sum to the account of the drawer who acquiesces in such charge, the liability of the drawer upon the original account, to pay which the check is drawn, should be held discharged.<sup>11</sup>

§ 545. **A Check** given by a debtor in settlement of an account is so far payment as to discharge the drawer as trustee of the payee, service being made on him after giving the check but before presentment; the check is payment *unless dishonored*.<sup>1</sup>

§ 546. **Check may be an Absolute Discharge, by Agreement, by Laches of Holder, or by Accident.** — The just principle seems to be, that if the check is paid, or if its non-payment is not due to any fault of the drawer, nor to insolvency of the bank within the standard time for presentment, the drawer is discharged so far as it would prejudice him to make the holder good. A check is a negotiable instrument, and, if given and accepted in accord and satisfaction of a debt for a larger amount, discharges the debt.<sup>1</sup> *Prima facie* a bill or note is only conditional payment, but by agreement it may be an absolute discharge (if genuine and there

<sup>9</sup> *Freeholders of Middlesex v. Thomas*, 20 N. J. Eq. 41; *Blair v. Wilson*, 28 Gratt. (Va.) 165; *Mullins v. Brown*, 32 Kan. 312; *Turner v. Bank*, 3 Keyes (N. Y.) 425, aff. 23 How. Pr. (N. Y.) 399.

<sup>10</sup> *Fleig v. Sleet*, 43 Ohio St. 53; *Manufacturers & Mechanics' Bank v. Gore*, 15 Mass. 75.

<sup>11</sup> *McFadden v. Follrath*, 114 Minn. 85, 130 N. W. 542, 37 L. R. A. (N. S.) 201, n. (1911).

It would be a novel burden if the drawer of a check were in such circumstances charged with the duty of determining that the indorsement of a check were authorized. *McFadden v. Follrath*, *supra*.

<sup>1</sup> § 545. *Getchell v. Chase*, 124 Mass. 366; *Parker-Fain Co. v. Orr*, 1 Ga. App. 628, 57 S. E. 1074 (1907); *Watt-Harley Co. v. Day*, 1 Ga. App. 646, 57 S. E. 1033 (1907). See *Larsen v. Allen Line S. S. Co.*, 45 Wash. 406, 88 Pac. 753, 122 Am. St. Rep. 926, 9 L. R. A. (N. S.) 1258, n. (1907).

<sup>1</sup> § 546. *Wells v. Morrison*, 91 Ind. 51 (1883); *Wisner v. Schopp*, 34 App. Div. (Hun, N. Y.) 199; *Sutton v. Baldwin*, 146 Ind. 361, 45 N. E. 518; *Ostrander v. Scott*, 161 Ill. 339, 43 N. E. 1089; *Bailey v. Partridge*, 134 Ill. 188, 27 N. E. 89.

A long and unexplained holding of a check tends to show its acceptance and the conditions on which it was tendered. *Bloomquist v. Johnson*, 107 Ill. App. 154 (1903).

is no fraud) of the original debt, and the debtor be thereafter only responsible as indorser; as where the debtor proposed to remit a draft "in payment of bill in full", and the offer was accepted, and the receipt of the draft acknowledged in payment of the account in full, the creditor could not bring suit afterward on the account, but only on the indorsement; though in case of forgery, fraud, or misrepresentation, the rule would be different.<sup>2</sup>

By agreement of the parties, a check may be given and received in absolute discharge of a debt;<sup>2a</sup> and whether it was so given is a question of fact for the jury.<sup>3</sup> But in absence of agreement, a check given for an antecedent debt is not an extinguishment of it, but is only a means of payment,<sup>4</sup> except when the drawer is injured by the laches of the holder, and then the drawer is discharged so far as injured.<sup>5</sup> It would seem, also, that even though the payee is not negligent, yet if by accident or fraud the check passes from him and is paid to a *bona fide* holder for value without notice, the payee should bear the loss. If paid on a forged indorsement, of course he can recover of the bank unless negligent. (See § 395 A.)

A. received a check, accompanied by a letter, which erroneously referred to the amount of the check as the balance due on a certain amount. A. accepted the check, and he was not barred from recovering the rest of the account, where at the time of accepting the check he had no reason to believe that the statement contained in the letter was not true, and that he did not accept the check in accord and satisfaction.<sup>6</sup>

<sup>2</sup> Day v. Thompson, 65 Ala. 269 (1880).

<sup>2a</sup> Good v. Singleton, 39 Minn. 340, 40 N. E. 359; Equitable National Bank v. G. & S. Co., 113 Cal. 692, 45 Pac. 985; Comptoir D'Escompte v. Dresbach, 78 Cal. 15, 20 Pac. 28; Briggs v. Holmes, 118 Pa. St. 283, 12 Atl. 355; Watt-Harley Co. v. Day, 1 Ga. App. 646, 57 S. E. 1033.

<sup>3</sup> Blair v. Wilson, 28 Gratt. (Va.) 165 (1877); Springfield v. Green, 7 Baxter (Tenn.) 301.

<sup>4</sup> Peoria & Pekin Union R. Co. v. Buckley, 114 Ill. 337, 2 N. E. 179; Stevens v. Park, 73 Ill. 387; Heartt v. Rhodes, 66 Ill. 351; Small v. Franklin Mining Co., 99 Mass. 277; Ocean Towboat Co. v. Ship Ophelia, 11 La. Ann. 28; Davison v. City Bank, 57 N. Y. 82; Sweet v. Titus, 4 Hun (N. Y.) 639; Phillips v. Bullard, 58 Ga. 256; Currie v. Misa, L. R. 10 Exch. 153; Thomas v. Supervisors, 115 N. Y. 47, 21 N. E. 674; Edwards Bottling Works v. Jarnagin, 11 Ga. App. 162, 74 S. E. 1004 (1912).

<sup>5</sup> Blair v. Wilson, 28 Gratt. (Va.) 165; Taylor v. Wilson, 11 Met. (Mass.) 44; Sweet v. Titus, 4 Hun (N. Y.) 639; Stevens v. Park, 73 Ill. 387; McFadden v. Fallrath, 114 Minn. 85, 130 N. W. 542, 37 L. R. A. (N. S.) 201, n. (1911).

<sup>6</sup> McKay v. Myers, 168 Mass. 312, 47 N. E. 98.

§ 547. **Check as a Loan.** — The presumption is that a check is given as payment,<sup>1</sup> but it may be shown to be a loan; as where A. (deceased) had given B. a check, and it was proved that A. was free from debt, and that B. had not rendered him service, the check was deemed a loan.<sup>2</sup>

§ 547 A. **A Tender** of money by check is good if the only objection to it is insufficiency of amount.<sup>1</sup>

§ 548. **Gift of Check.**<sup>1</sup> A gift *inter vivos* requires intent to pass the property without reference to death,<sup>2</sup> and actual or constructive delivery.<sup>3</sup> A gift *donatio causa mortis* requires (1) intent to pass the property upon the death of the donor from his existing illness, and (2) delivery. Some cases say, actual payment of the check in the life of the donor is necessary, or payment afterward, the bank being ignorant of the drawer's death. Others hold that death does not prevent collection of the check, and this seems the better opinion in reason.<sup>4</sup> Justice requires that a check given as a *donatio mortis causa* should be payable within a reasonable time after death, and if the donor's personal representatives have got possession of the deposit, the check should be good against the estate; but, as the law stands, the donee must, to be safe, collect in the life of the donor, or transfer for value to a *bona fide* holder.<sup>5</sup>

§ 549. **Gift of a Check, Causa Mortis and Inter Vivos.** — A gift may be *inter vivos*, i.e., intended to take effect without reference to the death of the donor, in which case there must be (1) an intent to pass the property, and (2) actual delivery; or the gift may be a *donatio causa mortis*, i.e., intended to take effect only upon the donor's death from his existing illness,<sup>1</sup> in which event it is said in some cases that there must not only be an intent to pass the property, but an actual delivery of the money in payment of the check, or at least on acceptance of the check before death of the donor, if the check be drawn by him.<sup>2</sup> That there must be an

<sup>1</sup> § 547. *Koehler v. Adler*, 91 N. Y. 657.

<sup>2</sup> *Stimson v. Vroman*, 99 N. Y. 74.

<sup>1</sup> § 547 A. *Raymond v. McKinney*, 58 Mo. App. 303; *Larsen v. Breene*, 12 Col. 480, 21 Pac. 498. See *Shay v. Callanan*, 124 Iowa 370, 100 N. W. 55 (1904).

<sup>1</sup> § 548. See gift of deposit, 607.

<sup>2</sup> § 549.

<sup>3</sup> *Zeller v. Jordan*, 105 Cal. 143, 38 Pac. 640. See § 551.

<sup>4</sup> § 550.

<sup>5</sup> § 549.

<sup>1</sup> § 549. *Kenistons v. Sceva*, 54 N. H. 37 (Foster, J.).

<sup>2</sup> See cases cited in the next section. Death before payment revokes except as against *bona fide* holder. *Bouts v. Ellis*, 17 Beav. 121.

actual delivery at some time, in order to complete the gift, is of course true; and that there must be such a delivery by the donor as to clearly indicate his intent to transfer the property from himself, and an actual transfer of the rightful possession or control of the property, is also true. But this, we contend, is done when he gives a check to the donee, or to another to give to the donee, and does not revoke before the delivery is made according to instructions. In this peculiar case of a check, the donor could revoke during his life; but as against the rest of the world it is a clear delivery of control of the money, and no one but the creditors of the donor have a right to object. They have a superior equity to the donee,<sup>3</sup> but if the donor is solvent, and continues in the same mind till his demise, what right has any one else to interfere with his clear intent? A bill of exchange may be the subject of a *donatio causa mortis*,<sup>4</sup> and the death of the drawer of a bill does not operate to change the duty of the drawee to accept it;<sup>5</sup> why should it be different in the case of a check? The rule that has grown up is a child of the error that the drawer's death is a revocation (§ 396) of the bank's authority to pay his checks, and should be banished with its parent. It does not seem sensible to say that a *donatio causa mortis* is a gift to take effect *in case of death*, and then to say that the donor did not intend it to be good unless it took effect before his death. And if he intended it to take effect after death, why not give life to his intent? If it is said that the formalities of the wills act must be conformed to in order to guard against fraud, then let the law be consistent, and deny the possibility of any gift *causa mortis*, by savings bank book, or any delivery actual or constructive. If he had given bank bills, or the same money that is on deposit in the bank, to some person, D., to keep, and in case the donor died to give it over to the donee, it would surely be held a good gift; in such case, it could not be properly said that the agent's authority was revoked by his principal's death, for it is clear that, instead of ceasing at the donor's demise, it is then only that the agent's authority arises. Where a donor delivered to B. for the donee, it has been held that a delivery by B. to the donee after the death of the donor is good.<sup>6</sup> And if an agent's authority does not always die with his principal,

<sup>3</sup> Chase v. Redding, 13 Gray (Mass.) 418.

<sup>4</sup> See Rolls v. Pearce, § 550 a.

<sup>5</sup> 1 Parsons on N. & B. 287; Cutts v. Perkins, 12 Mass. 206.

<sup>6</sup> Sessions v. Moseley, 4 Cush. (Mass.) 87.

then is it not common sense to hold that a bank's authority does not cease, at any rate in relation to checks that the donor delivered with the very intent that the fund should go to the donee in case of his death? The donor has a right to do with his property as he chooses, and his intent clearly indicated should be respected, and his personal representative has no right to frustrate his wish. The continuous progress of legal thought on this subject of gift points to the conclusion set forth above, viz., that although a gift of a check cannot give an action against the donor himself, nor prefer the donee to creditors, yet it should be held otherwise good. And if the donor is solvent and does not revoke during his life, it ought, we think, to be good against the *deposit*, and against his personal representatives when they have obtained possession of the deposit, on which the check was drawn; for in this respect the theory that said personal representatives are identical with the deceased is groundless; any action they may take against the donee profits, not the deceased, but his heirs and legatees, and therefore the executor or administrator in reality represents said heirs or legatees, and as against them the donee has the superior equity.

In early times only chattels which could be delivered by hand were allowed to be subjects of *donatio causa mortis*; then bank bills, and securities payable to bearer or to order and indorsed; then bonds; and subsequently non-negotiable paper has been held to pass, and negotiable paper indorsed by the donor, although of course the estate of the donor ought not to be liable on the indorsement, the fair presumption being that the donor intends to give the security held by him against some third party. And it seems only a proper continuance of this spirit, manifested more and more by the law, to give effect to *bona fide* transactions, and thus so far as possible secure stability and favor prevision, to hold that, when the donor gives his check and dies solvent without revoking the gift, it should be held valid against all the world beside; to hold otherwise is to allow others to declare the donor's act a nullity which he by his conduct clearly declared to be valid, and the wills act should be confined to cases in which there is no constructive or actual delivery of possession or the emblem of control.

§ 550. **The Cases** are in great confusion. Grant lays it down that a check may be the subject of a good *donatio mortis causa*.<sup>1</sup>

<sup>1</sup> § 550. Grant on Bankers and Banking (3d ed.) p. 107, citing *Bouts v. Ellis*, 4 De. G., M. & G. 249; 17 Jur. 405, 585; *Tate v. Hilbert*, 4 Bro.

But in Williams on Executors the contrary doctrine is asserted; the author remarking that a check "is an order for the payment of money, that may take effect immediately, and in the lifetime of the donor; so that it is (generally speaking) altogether inconsistent with the nature of a *donatio mortis causa*."<sup>2</sup>

(a) A testator, upon his deathbed, drew a check to the order of his wife, and gave it to her. Before his death she indorsed it and deposited it with bankers in a foreign country, and subsequently she drew sundry checks upon these bankers against this deposit, which checks appear to have been duly honored. The bankers on whom the check was drawn refused payment when the check was presented after the decease of the drawer, on the ground that after the death their authority to pay was at an end. The question was then presented whether or not the check was a good *donatio mortis causa*. Vice-Chancellor Malins remarked that the law seemed to be in a curious state, since it permitted a bill of exchange, in its nature not payable till a future day, to be a good subject of *donatio*, but denied this privilege to a check unless it should be presented for payment before the drawer's death. He then sought to confine the rule as regards checks to such only as are payable to bearer, admitting that these must fall within the foregoing doctrine. The check in question was payable to order, and it was clear that the testator knew that it could not be presented for payment either on the day when it was drawn or on the next following day. "I must attribute to him the knowledge that the check would not be paid for some time, and on that ground I come to the conclusion that this case differs from the other cases

C. C. 286; 2 Ves. Jr. 111; Reddell v. Dobree, 3 Jur. 722; 10 Sim. 244; Hewitt v. Kaye, 37 L. J. Ch. 633; First National Bank v. Byrne, 117 Ill. App. 473 (1913). In this case the check was drawn for more than the amount of money on deposit as the drawer did not know the exact amount but intended to give it all, and the check was not paid before the death of the drawer but solely for the reason that it was larger than the amount on deposit.

<sup>2</sup> Williams on the Law of Executors and Administrators, p. 779, citing Tate v. Hilbert, 2 Ves. Jr. 111, at p. 120; s. c. 4 Bro. C. C. 286; Tate v. Leithead, Kay, 658; Hewitt v. Kaye, 6 L. R. Eq. 198; *In re Beaks Estate*, 13 *id.*, 489 (where the pass-book was also given to the payee, but the check was not presented till after the drawer's death); Second National Bank v. Williams, 13 Mich. 282; Harris v. Clark, 3 N. Y. 93; Coutant v. Schuyler, 1 Paige (N. Y.) 316; Shirley v. Whitehead, Ired. Eq. (N. C.) 130; Mandeville v. Welch, 5 Wheat. 277, 5 L. ed. 87 (286); Tiernan v. Jackson, 5 Pet. 580, 8 L. ed. 234; Roney v. Dunleary, 39 Ind. App. 108, 79 N. E. 398 (1906); Beaumont v. Ewbank, (1902) 1 Ch. 889.



of checks. . . . I think that when a man gives his wife a check, it is in substance as complete a gift as if he handed her the cash." The Vice-Chancellor regarded *Tate v. Hilbert* as an authority directly supporting him, and preferred, "if there is any real discrepancy", to accept as correct the report of that case given in 2 Ves. 111, rather than the report contained in 2 Bro. C. C. 291. This case he interpreted as intending to hold "that an actual dealing for value with a note would complete the gift as a valid *donatio mortis causa*."<sup>3</sup>

Where the testator in his last illness drew a bill on his goldsmith in favor of A., and delivered it to her with directions indorsed upon it to buy her mourning, it was held a good *donatio mortis causa*.<sup>4</sup>

(b) So where a testator, remarking to his wife that he was dying, and that she would want money before his affairs could be settled, gave her a crossed check, and afterward procured a friend to take this and give to the wife his own [the friend's] check in exchange therefor, and the testator's check was paid before his death, and the friend's check after the death, it was held that the testator's check was good as a *donatio mortis causa*; but, at the same time, it was declared that a check not presented before the drawer's death was not a good *donatio mortis causa*.<sup>5</sup>

Where the check was presented before the donor's death, and was not then paid only because the bankers were in doubt as to the genuineness of the signature, and on the day following the drawer died, the payee was held to be entitled, on the ground that there had been a complete gift of the amount of the check *inter vivos*.<sup>6</sup>

(c) A somewhat different case is where the donor gave to the donee an instrument whereby the banker acknowledged that he held a certain sum belonging to the donor at the donor's disposal. This gift was upheld as a good *donatio mortis causa*.<sup>7</sup> Here, however, we have the peculiar state of facts of the banker's acknowledgment, followed by the actual disposition of the fund. It resembles an assignment, such that at once upon its completion

<sup>3</sup> *Rolls v. Pearce*, 5 Ch. D. 730.

<sup>4</sup> *Lawson v. Lawson*, 1 P. Wms. 441.

<sup>5</sup> *Bouts v. Ellis*, 17 Beav. 121; s. c. affirmed on appeal, 4 De G., M. & G. 249.

<sup>6</sup> *Bromley v. Brunton*, 6 L. R. Eq. 275.

<sup>7</sup> *Amis v. Witt*, 33 Beav. 619; *Grymes v. Hone*, 49 N. Y. 17; *Meach v. Meach*, 24 Vt. 591; *Harris v. Clark*, 3 N. Y. 111.

the banker held the money for the assignee or donee, and no longer for the donor, — quite a different condition of affairs from that resulting from the delivery of a check. In Missouri it is said that delivery is essential, even if it is possible that a check can be a good *donatio mortis causa*.<sup>8</sup>

(d) The check of A. to the order of B. was delivered by B. indorsed in blank to C. as a gift, the day before B.'s death. It was held good though not presented till after B.'s death; but if it had been drawn by B., his death would have been a revocation.<sup>9</sup>

The check of A. payable absolutely to B. was not delivered to B. until after the death of A. and it was held that as the check was for the entire deposit of A. it operated as an assignment, was a good gift *causa mortis* and could be collected by B.<sup>9a</sup>

(e) The law wishes to protect dying persons from fraud, and from this care results the provisions in regard to wills, that such matters may be properly evidenced. It was said in Vermont: "The very circumstance which sometimes renders a will suspicious is the living principle in a *donatio causa mortis*." <sup>10</sup>

§ 551. **Gift Inter Vivos.** — The remarks above as to *donatio causa mortis* apply partly to checks given *inter vivos*. The transfer of the paper to the possession of the donee should be regarded as sufficient evidence of intent to give the amount to the donee, very much as the transfer of the pass-book with intent to transfer the deposit is held sufficient (§ 607). There is, to be sure, ground for holding that the donor may revoke in his lifetime by countermanding the check (§ 396), except as against a *bona fide* holder. For in the case of an ordinary check the bank must pay according to that order of the depositor that first reaches it. But if the donor does not revoke, and he is solvent, we think the gift should be good as a transfer of the deposit *pro tanto* against all the world beside, whether the donor be dead or alive. The cases, however, do not allow any right in the donee as against the personal representative who has got possession of the deposit on which the check was drawn; and the drawer's death is held to revoke the bank's power to pay his checks. So that, as the law stands, a gift check must be turned into money before the drawer's death, or the

<sup>8</sup> Walter v. Ford, 74 Mo. 195.

<sup>9</sup> Burke v. Bishop, 27 La. Ann. 465.

<sup>9a</sup> Varley v. Sims, 100 Minn. 331, 111 N. W. 269, 117 Am. St. Rep. 694, 8 L. R. A. (N. S.) 828 (1907).

<sup>10</sup> Holley v. Adams, 16 Vt. 206.

holder must transfer it to a *bona fide* purchaser, in order to realize on it.

A check was delivered with intent to make a gift of the fund, but the drawer died before the check was paid or accepted, and the court held that this fact revoked it (§ 396), saying there must be a complete delivery of the subject-matter to constitute a valid gift.<sup>1</sup> If a check be given by the drawer to the payee as a gift, and be then dishonored by the bank, the payee has no right of action thereon against the drawer, since the instrument constitutes a mere gratuitous undertaking, and the transaction remains incomplete until the money has actually passed. The check, before payment, is in the nature only of a promise to pay.<sup>2</sup> A father gave his little boy a check, saying, "I give this to baby for himself," after which he took the check from the boy's hand and put it away. Although the father expressed further his intent to give the amount to his son, the court held that no trust had been declared, and when the father died the amount did not go to the son.<sup>3</sup> If the law is to look at substance, and not form, we think that giving the boy this check was the same as to intent as giving him so much money, and no one but the father or his creditors had any right to object. A gift of negotiable paper of a third party does not give any right of action against the donor or his personal representatives to the donee,<sup>4</sup> but against parties prior to the donor the donee can recover the same as the donor could;<sup>5</sup> and a *bona fide* holder for full value can recover against all parties, though, if a *bona fide* holder gives an adequate consideration, he can recover only what he paid, as against a party having a defence against the donor.<sup>6</sup>

§ 552. **Checks as Evidence of Debt and Payment.** — **As between Drawer and Payee.** — A check which has been in circulation, or which has been paid and cancelled by the bank on which

<sup>1</sup> § 551. *Simmons v. Cincinnati Savings Society*, 31 Ohio St. 457; *Thresher Adm'r v. Dyer Ex'or*, 69 Conn. 404, 37 Atl. 979; *Kern's Estate*, *Gilpin's Appeal*, 171 Pa. St. 55, 33 Atl. 129; *Dinely v. McCullagh*, 29 Hun (N. Y.) 454; *Schollmier v. Schoendelen*, 78 Iowa 426, 43 N. W. 282; *Pullen v. Placer County Bank*, 138 Cal. 169, 71 Pac. 83, 94 Am. St. Rep. 19 (1902).

<sup>2</sup> *Easton v. Pratchett*, 1 C. M. & R. 808.

<sup>3</sup> *Jones v. Lock*, L. R. 1 Ch. App. 25.

<sup>4</sup> *Easton v. Pratchett*, 1 C. M. & R. 798.

<sup>5</sup> *Milnes v. Dawson*, 5 Exch. 948.

<sup>6</sup> *Brown v. Mott*, 7 Johns. (N. Y.) 361; *Youngs v. Lee*, 18 Barb. (N. Y.) 187.

it is drawn, may become very valuable as evidence of the fact of payment of the debt of the drawer to the payee. It is not, of course, proof positive of this fact, and as preliminary to its introduction a debt owing from the drawer to the payee at or before the date of the check must be shown. But this basis having been established, the production of the circulated or paid and cancelled check is *prima facie* evidence of payment.<sup>1</sup> But a mere check, without more, is not conclusive evidence of a debt due from the drawer to the payee. It must be supplemented by proof of the consideration on which the check was given.<sup>2</sup>

McClain v. Lowther,<sup>2a</sup> however, holds that the drawing and delivery of a check implies an indebtedness, of the drawer to the payee, to the amount of the check, and no allegation of consideration is necessary.

### *Check may be Given as a Loan*

The *prima facie* evidence afforded by a check is open to rebuttal, by proof of circumstances going to show that the intention of the parties at the time of the passing of the check was not to pay and cancel the indebtedness between them, but to make an independent transaction in the way of a loan. A. may be indebted to B., and yet it may be arranged and understood between them that the transfer of money on any particular occasion from A. to B. shall not operate as a payment and discharge of the debt, either in whole or in part, but shall constitute a distinct and separate dealing in the shape of a loan from A. to B. In such a case the evidence of the check may be overruled by the explanatory evidence, showing the real character of the transaction.<sup>3</sup>

If a check be made payable to A. or bearer, it is not evidence of payment of the drawer's debt to A., unless there is also evidence that the amount has been actually paid to A. A.'s name indorsed upon the back of the check will be sufficient evidence that he has received the money upon it.<sup>4</sup>

<sup>1</sup> § 552. Bleasby v. Crossley, 3 Bing. 430; Pearce v. Davis, 1 M. & Rob. 365; Patton's Adm'r v. Ash, 7 Serg. & R. (Pa.) 116; Mountford v. Harper, 16 M. & W. 825; 16 L. J. Exch. 182; Thompson v. Pitman, 1 F. & F. 339.

<sup>2</sup> Aubert v. Walsh, 4 Taunt. 293; Lloyd v. Sandilands, Gow, 15; corrected by Alderson, B., in Mountford v. Harper, 16 M. & W. 825; Patton v. Ash, 7 Serg. & R. (Pa.) 116.

<sup>2a</sup> 35 W. Va. 297, 13 S. E. 1003.

<sup>3</sup> Boswell v. Smith, 6 Car. & P. 60.

<sup>4</sup> Egg v. Barnett, 3 Esp. 196.

§ 553. **As between Drawer and Bank.** — A check shown to have been presented and paid is not evidence of a loan or advance by the bank to the drawer. On the contrary, the presumption of law always is that a check is drawn against, and paid out of, funds previously deposited. Accordingly a paid check is *prima facie* evidence of a *repayment pro tanto* by the bank of a prior deposit. If it is claimed to be an overdraft, and that its payment was an advance to the customer, the burden of proving it to be so is upon the bank.<sup>1</sup> Possession by the drawee bank is *prima facie* evidence of payment.<sup>2</sup>

§ 554. **Check as Testamentary Instrument.** — A check may, under proper circumstances, be admitted to probate as a testamentary document.<sup>1</sup>

<sup>1</sup> § 553. *Fletcher v. Manning*, 12 M. & W. 571, cited and approved in *Lancaster Bank v. Woodward*, 18 Pa. St. 357; *Other v. Iveson*, 3 Drew. 177; 24 L. J. Ch. 654; *Byles on Bills*, p. \*23. Also *Sharswood's* note to p. \*21 of same.

<sup>2</sup> *Wilson v. Goodin*, *Wright* (Ohio) 219.

<sup>1</sup> § 554. *Walsh v. Gladstone*, 1 Phil. Ch. C. 294; *Bartholomew v. Henley*, 3 Phil. 317; *Heming v. Clutterbuck*, 1 Bligh (N. s.) 479; *Brine v. Ferrier*, 7 Sim. 549; *Gladstone v. Tempest*, 2 Curt. 650; *Jones v. Nicolay*, 2 Robt. 288; *In the Goods of Marsden*, 1 Sw. & Tr. 542.

## CHAPTER XXXV

### NOTES AND ACCEPTANCES

See Payment of Checks, § 362. Forged Checks, § 461. Payment of Deposit, § 310.

The law of this subject is in a very confused state.

#### DUTY TO PAY.

It is *held*,

- § 557. (1) That when a note is made payable at a bank, or a bill is accepted payable there, it is equivalent to an order by check and the bank must pay under the same limitations, 310, 430 and that it *may* even advance the money. This is no doubt the coming rule; it is in the track of increasing definiteness in commercial relations.
- § 557 a. (2) That at any rate a bank *may* pay.
- § 557 b. (3) That it is under no obligation to pay.
- § 557 c. (4) That it has no right to pay without express orders.
- § 557 d. And where it pays without authority it cannot recover from payee.

#### NOTE HELD BY BANK. BANK *v.* MAKER OF NOTE.

- § 559. (5) When the note is held by the bank, it *may* appropriate to it any deposit at maturity or subsequently received (unless specifically for other object), or proceeds of paper owned by the maker of the note in its hands for collection.
- § 559. (6) But is under no obligation to do so. It may sue the maker on the note instead, but he can set off his deposit if still in bank.

#### RETENTION.

- § 561. (7) A bank cannot retain a deposit for a note not due, but equity will permit such retention, if the bank is in danger of loss.

#### RIGHTS OF INDORSERS.

It is *held*,

- § 562. (8) That if the bank, having a note, fails to apply an existing and applicable deposit upon the note, the sureties are discharged.
- § 562 b. Of course, if there is anything in the agreement between the parties to the paper, or between the bank and the depositor, inconsistent with the application of the funds to the paper, the bank is in no fault, and the sureties are not discharged.

This rule approved.

- § 562 a. (9) That as to deposits subsequent to maturity no such duty exists.  
 (10) That a bank is not bound to apply a deposit to a note as against sureties.
- §§ 563, 557 b. (11) That a bank has no right to pay a note without orders.  
 A SPECIFIC DEPOSIT,
- § 564. Made for the express purpose of paying a bill or note, cannot be applied to any other purpose.
- § 564. Whether the holder can sue the bank for improper refusal to pay in such case, *quære*. § 490 A.
- § 564 A. CERTIFICATION OF NOTES.

§ 557. **Note made Payable at the Bank.** — *It is the bank's duty to pay depositor's notes.* — If the note of a depositor is made payable at a bank, it is its duty to pay <sup>o</sup> the same. It "is equivalent to a check drawn by him on that bank" except as to discharge of maker by non-presentment.<sup>1</sup>

*At Least it Has Authority so to Do*

(a) As it is the duty of the bank to pay its customers' checks, when in funds, so at least it has authority, if it is not actually under obligation, to pay his bills, notes, and acceptances, drawn on or made payable or negotiable at the bank.<sup>2</sup> For it is a presumption of law that if a customer does so draw upon his bank, or make any of his paper payable or negotiable there, it is his intent to have the same discharged from his deposit. It is his order to pay, equally with his check; and if the bank pay, without express orders to the contrary, it shall be protected in so doing, and it shall be a good defence to a suit by the depositor. *Nay*,

<sup>o</sup> § 557. When the bank upon maturity of the note writes a check upon a bank in another city for the remittance of the amount and stamps the word "Paid", and the date on the face of the note, and cancels the note with perforations and files it with the paid checks there is a payment of the note. *Nineteenth Ward Bank v. First National Bank*, 184 Mass. 49, 67 N. E. 670 (1903).

<sup>1</sup> *Indig v. National City Bank*, 80 N. Y. 106; *Nineteenth Ward Bank v. First National Bank*, 184 Mass. 49, 67 N. E. 670 (1903).

<sup>2</sup> *Kymer v. Laurie*, 18 L. J. Q. B. 218; and see *Woods v. Thiedemann*, 1 H. & C. 478; *Mandeville v. Union Bank*, 9 Cranch 9, 3 L. ed. 639 (Marshall, C. J.); *Ætna National Bank v. Fourth National Bank*, 46 N. Y. 82; *Citizens' Bank v. Carson*, 32 Mo. 191; *Bedford Bank v. Acoam*, 125 Ind. 584, 25 N. E. 713; *Dillingham v. Parks*, 30 Ind. App. 61, 65 N. E. 300 (1902); *Kerbaugh v. Nugent*, 48 Ind. App. 43, 95 N. E. 336 (1911).

The bank, as the indorsee and representative of the real owner of the note was the party entitled to demand and receive payment, and payment to it would be payment of the note. *Nineteenth Ward Bank v. First National Bank*, 184 Mass. 49, 67 N. E. 670 (1903).

it has been said, that, if the bank refuse to pay, it shall be liable in damages, in like manner as for its refusal to pay the check of a customer when in funds sufficient to do so.<sup>2a</sup> But in case of its refusal to pay an acceptance, the writ shall lie in favor of the acceptor only, and not in favor of the drawer; for it is to be supposed that the acceptor provided the funds; and, further, it would seem that at any rate the payment could be properly made only from his funds, since it was at least *prima facie* his duty, and not the drawer's, to supply the means of payment.<sup>3</sup>

(b) A bank is under no obligation to pay a note made payable at its counter, unless the maker has placed funds there for that purpose;<sup>4</sup> and retention of a note sent through the clearing-house after the hour named in the rules for return of checks is not payment, even though the bank have funds of the maker, in the absence of evidence that the depositor had authorized the bank to pay his notes out of his deposit.<sup>4</sup>

(c) A bank at which a draft or note is payable has no right without the acceptor's or maker's special direction, verbal or written, to apply thereto money which he has on deposit in the bank.<sup>5</sup>

(d) A bank receives a note for collection from A. and charges it to the maker's account and remits the proceeds to A. The maker claims that his signature to the note is unauthorized, but that he in fact owes it. The bank cannot recover from A., but the transactions operate as an assignment of the debt which the bank may set off against the maker's account.<sup>6</sup>

§ 558. **Bank may advance the Money called for by the Bill or Note.** — If the banker at whose counter the bill or note of his customer is made payable has not at the time for payment a sufficient amount for this purpose to the credit of the customer,

<sup>2a</sup> *Brooke v. Tradesmen's National Bank*, 69 Hun (N. Y.) 202.

<sup>3</sup> *Thatcher v. Bank of State of New York*, 5 Sandf. (N. Y.) 121; *Griffin v. Rice*, 1 Hilt. (N. Y.) 184; *Mandeville v. Union Bank*, 9 Cranch 9, 3 L. ed. 639. In this last case it was held that a bank was authorized to advance on the drawer's account the money called for by his bill or draft.

<sup>4</sup> *Exchange Bank v. Bank of North America*, 132 Mass. 150.

<sup>5</sup> *Haines v. McFerren*, 19 Brad. (Ill.) 172 (1885); *Wood v. Merchants' Savings, Loan & Trust Co.*, 41 Ill. 267 (leader). See also *Ridgely National Bank v. Patton*, 109 Ill. 479 (1884); *Second National Bank v. Hill*, 76 Ind. 223; *Scott v. Shirk*, 60 Ind. 160; *Gordon v. Muchler*, 34 La. Ann. 604; *Grissom v. Bank*, 87 Tenn. 368, 10 S. W. 774, citing *Gill v. Ott*, 10 Lea 147.

<sup>6</sup> *Tufts v. People's Bank and Trust Co.*, 59 N. J. L. 380, 35 Atl. 792.



but if, nevertheless, he pays the bill or note, making up the deficit from his own funds, he will be entitled afterward to recover the amount so advanced by him, as money loaned to, or paid for the use of, the customer.<sup>1</sup> Though, of course, if the signature of the payee, or of the customer, be forged, the banker has lost his money.<sup>2</sup> If, however, the transaction on the part of the banker is not strictly a payment by him of his customer's paper, but is a dealing by way of discount, whereby he discounts such paper for a third party, it seems that the banker may recover from such third party.<sup>3</sup>

§ 559. **Bank v. Maker, when Note is held by the Bank.** — A bank, holding a note of a depositor, is under no obligation as against the maker to appropriate a sum sufficient to meet it from his funds on deposit, immediately upon its maturity, or indeed at any other particular time; <sup>0</sup> they may let the account run on, and take the chance that they will not lose in the end.<sup>1</sup> They are, however, at liberty at any time after maturity to make such appropriation,<sup>1a</sup> especially if the depositor seeks to withdraw his funds, or so much of them as not to leave a balance equal to the amount of the note. And not only the deposit in bank at maturity, but all afterward received (not for other purpose specifically) and proceeds of commercial paper owned by the depositor and left with the bank for collection, may be so applied.<sup>2</sup> Whether or

<sup>1</sup> § 558. *Forster v. Clements*, 2 Camp. 17; *Mandeville v. Union Bank*, 9 Cranch 9, 3 L. ed. 639.

<sup>2</sup> *Ibid.*; *Cocks v. Masterman*, 9 Barn. & Cr. 902.

<sup>3</sup> *Fuller v. Smith*, 1 C. & P. 197.

<sup>0</sup> § 559. In the absence of a demand therefor by the depositor. *Boothe v. Farmers' etc. National Bank*, 53 Or. 576, 98 Pac. 509 (1908); *Guernsey v. Marks*, 55 Or. 323, 106 Pac. 334 (1909).

If the bank does not have sufficient funds of the maker of a note at its maturity to discharge the note subsequent deposits by him are not required to be credited thereon by the bank without his demand therefor. *Boothe v. Farmers' etc. National Bank*, *supra*; *Guernsey v. Marks*, *supra*.

But when a bank which has purchased a note of a third party indorsed to it by its customer learns of the failure of consideration of the note and has funds of the indorser on deposit which it can apply to the note it cannot enforce it against the maker on the plea of innocent purchaser. *State Bank v. Blakey & Co.*, 35 Tex. Civ. App. 87, 79 S. W. 331 (1904).

<sup>1</sup> *Marsh v. Oneida Bank*, 34 Barb. (N. Y.) 298. But see *McCagg v. Woodman*, 28 Ill. 84; *Bank v. Peltz*, 176 Pa. St. 513, 35 Atl. 218; *Doctor v. Riedel*, 96 Wis. 158, 71 N. W. 119.

<sup>1a</sup> And the fact that an order for the voluntary dissolution of the drawer corporation has been signed but not entered is immaterial. *Wilcox v. National Shoe etc. Bank*, 67 App. Div. 466 (1902), 73 N. Y. S. 900.

<sup>2</sup> A bank may apply deposit in payment of note. *Muench v. Bailey National Bank*, 11 Mo. App. 144 (1881). See *Ehlermann v. St. Louis*

not they could charge interest for the period during which their own neglect has allowed their debt to remain uncollected is a question which has never been passed upon. Probably they could do so. For ability to collect by a stoppage of the debtor's funds is by no means equivalent to payment or discharge, and is not an act which they are under any obligation to him to do. Where the note had been put in judgment, without any previous effort by the bank to pay it from the depositor's balances, it was held that the judgment might still be set off by the bank against the deposit account. The bank could not be compelled to lose anything because it chose to waive a lien and proceed like any ordinary creditor. It therefore appears that, however objectionable it may be as a hardship upon the debtor, yet it is a strict legal right of a bank holding a depositor's note and sufficient of his funds to meet it at or after maturity, to refrain from applying these funds to this purpose, and to put the note in suit.<sup>3</sup>

§ 560. **Bank's Insolvency. — Maker's Set-off.** — As the bank has thus the right to pay itself the promissory note of the depositor out of his deposit, so, on the other hand, the depositor has the reciprocal right of demanding that the bank shall do so. Where a banker, holding a customer's note, before maturity thereof made an assignment of all his property for the benefit of his creditors, including, of course, both the note and the customer's balance, it was held that the customer might insist upon having the note satisfied out of the deposit standing to his credit.<sup>1</sup>

§ 561. **Retention of Deposit to pay Note not yet due.** — A bank has no legal right to retain a deposit to pay notes not yet due.<sup>1</sup> But equity will allow such retention, if the bank is in danger of loss. (See § 323.)

§ 562. **Rights of Indorsers.** — *Failure of bank to apply deposit to note discharges surety.* — If a note payable at a bank is sent

National Bank, 14 Mo. App. 591, Append.; and *Home National Bank v. Newton*, 8 Ill. App. 563 (1881).

<sup>3</sup> *Doctor v. Riedel*, 96 Wis. 158, 71 N. W. 119; *Boothe v. Farmers' etc. National Bank*, 53 Or. 576, 98 Pac. 509 (1908).

<sup>1</sup> § 560. *McCagg v. Woodman*, 28 Ill. 84. See *March v. Oneida Bank*, 34 Barb. (N. Y.) 298.

<sup>1</sup> § 561. *Jordan v. National Shoe & Leather Bank*, 74 N. Y. 473; *Commercial National Bank v. Proctor*, 98 Ill. 558; *Appeal of Farmers & Mechanics' Bank*, 48 Pa. St. 57; *State Savings Association v. Boatmen's Savings Bank*, 11 Mo. App. 292; *State Bank v. McCabe*, 135 Mich. 479, 98 N. W. 20 (1904).

there for collection, and the bank fails to apply an unappropriated deposit of the maker to its payment, the indorser is discharged. When a creditor has within his control the means of paying the debt out of property of the debtor properly applicable to the purpose,<sup>0</sup> and does not use the opportunity, but gives up the property, the surety is discharged.<sup>1</sup> And this is true even if the maker gives notice forbidding such application of the deposit.<sup>1a</sup>

*Otherwise as to Subsequent Deposits*

(a) But if the funds are insufficient at maturity, and the note is protested, the bank is not obliged to apply subsequent deposits to the note in order to save the indorser.<sup>2</sup> Moreover, evidence to show that six days after the maturity of the note and at other times thereafter the bank had a balance in favor of the maker large enough to pay the note is incompetent and irrelevant.<sup>2a</sup> And where the note first presented was refused for lack of funds,

<sup>0</sup> § 562. A specific deposit is not applicable. *Planters' State Bank v. Schlamp*, 124 Ky. 295, 99 S. W. 216 (1907); *Royse v. Winchester Bank*, 148 Ky. 368, 146 S. W. 738 (1912).

<sup>1</sup> *McDowell v. Bank of Wilmington & Brandywine*, 1 Harr. (Del.) 369; *Dawson v. Real Estate Bank*, 5 Pike (Ark.) 283; *Commercial National Bank v. Henninger*, 105 Pa. St. 496 (1884); *Everly v. Rice*, 8 Harris (Pa.) 297; *Kuhns v. The Westmoreland Bank*, 2 Watts (Pa.) 136; *Bank v. Peltz*, 176 Pa. St. 513, 35 Atl. 218; *Mechanics' Bank v. Seitz Bros.*, 150 Pa. St. 632, 24 Atl. 356; *Central Bank v. Thein*, 76 Hun (N. Y.) 571; *German National Bank v. Foreman*, 138 Pa. St. 474, 21 Atl. 20; *Eades v. Muhlenberg Co. Sav. Bank*, 157 Ky. 416, 163 S. W. 494 (1914); *Lowe v. Reddan*, 123 Wis. 90, 100 N. W. 1038 (1904).

When the bank pays the receiver of a depositor and relies upon securities which it holds, and which includes, though without the knowledge of the bank, assets belonging to customers of the pledgor, the owners of the rehypothecated collateral are entitled to have the funds and securities available to the bank marshalled and applied in such a way as to relieve their property as far as practicable without injury to the bank's interest. *Records v. McKim*, 115 Md. 299, 80 Atl. 968 (1911).

<sup>1a</sup> *German National Bank v. Foreman*, 138 Pa. St. 474, 21 Atl. 20.

<sup>2</sup> *People's Bank of Wilkesbarre v. Legrand*, 103 Pa. St. 309 (1883); *Martin v. Mechanics' Bank*, 6 Harr. & Johns. (Md.) 235 (1824); *First National Bank v. Zahm*, 16 W. N. Cas. (Pa.) 552; *Voss v. German American Bank*, 83 Ill. 599 (1876); *National Bank v. Smith*, 66 N. Y. 271; *Bank v. Peltz*, 176 Pa. St. 513, 35 Atl. 218; *Bacon's Adm'r v. Bacon's Trustees*, 94 Va. 686, 27 S. E. 576; *Merchants & Planters' Bank v. Meyer*, 56 Ark. 499, 20 S. W. 406; *State Bank v. McCabe*, 135 Mich. 479, 98 N. W. 20 (1904); *Eades v. Muhlenberg Co. Sav. Bank*, 157 Ky. 416, 163 S. W. 494 (1914).

<sup>2a</sup> *Bank v. Peltz*, 176 Pa. St. 513, 35 Atl. 218; *Sieger v. Second National Bank*, 132 Pa. St. 307, 19 Atl. 217.

and afterward, deposits coming in, a second note was paid, it was held that, as there was no evidence of any intention to apply the money to the first note, and the liability of the indorser and maker had become absolute before the deposit, the bank was right in regarding it as a general deposit to be paid upon the first order presented.<sup>3</sup> Such a case differs from one in which a check is presented and left with the bank to be satisfied by the first incoming funds. Where the maker of the promissory note is a depositor with the bank which holds it, and the note is dishonored and duly protested, and indorsers notified, the bank is not bound to apply towards payment of the note any sum (though sufficient to pay the note) which the maker may subsequently deposit, generally, upon his current account. The making of such a deposit, and failure by the bank to apply it in payment of the note, does not discharge the indorser. It is optional with the bank whether to make such application or not; and the intention of the maker of the note, so far as it can be inferred from the circumstances, would clearly appear to be contrary to any such use of the money.<sup>3</sup>

(b) If there is anything in the agreement as to the deposit between the parties to the paper, or between the bank and depositor, that is inconsistent with the right of the bank to apply the deposit on the paper, the surety is not discharged because the deposit is not so applied. The bank is not in fault. It may be that the circumstances are such as clearly to preclude any obligation of the bank, even as towards third parties, to make an appropriation of funds in the bank at maturity, towards discharging a liability. For instance, if the customer gives a bond to the bank generally, though he may often afterward have general deposits equalling or exceeding the amount of such bond, yet the bank is not bound to apply them in discharge thereof, provided there be satisfactory evidence that such was not the intent of the parties, nor in their contemplation when they executed and delivered the paper. This would be the case if it could be made to appear that the bond was intended to operate as a continuing security. Such intention, it has been said, may be shown or sufficiently inferred from proof of the language and conduct of the parties to the bond, though not occurring until after its execution.<sup>4</sup>

<sup>3</sup> *National Bank of Newburgh v. Smith*, 66 N. Y. 271.

<sup>4</sup> *Henniker v. Wigg*, 4 Q. B. (Ad. & El. N. s.) 792.

*Agreement or Order Interfering with Loan*

So if, by express agreement, or course of dealing between the bank and a depositor, a note of the depositor is not included in the general account between them, the bank cannot be compelled, for the benefit of a surety on the note, to apply towards its payment at maturity any balance of the depositor in its hands. Such application is at the option of the bank.<sup>5</sup> And if, by reason of the deposit being made under a special agreement with the depositor, the bank has no right to apply the funds in its possession to the note, the surety is not discharged by the lack of such appropriation.<sup>6</sup>

Where an indorser directs a note to the A. bank in which the maker keeps a deposit, although the note is payable at another bank, the indorser is not discharged by failure of the first bank to apply the maker's deposit to payment of the note at its maturity.<sup>7</sup>

§ 563. **Cases holding that a Bank is not bound to apply a Deposit on Notes as against Sureties.**—In an action by a bank against sureties on a promissory note discounted by it, it is no defence that before maturity the principal directed the bank to pay the note at maturity out of his general deposit in the bank; that the bank failed to do so, and subsequently allowed the principal to check the money out of the bank, although it knew of the suretyship at all times, and the deposit was sufficient to pay the note. The surety has no interest in the debt the bank owes the maker of the note. It is not a question what the bank could do, but what it is obliged to do.<sup>8</sup> It could save the surety future hazard by suing the debtor as soon as the note is due, but it is not obliged to sue; it may wait until the maker is insolvent, and still the surety is not discharged. To say that the bank must apply the proceeds is to say it must collect, though no party has requested it to do so. A deposit debt is not like a collateral security deposited on purpose to secure the note; *that* the bank

<sup>5</sup> *National Mahaiwe Bank v. Peck*, 127 Mass. 298. See *Glazier v. Douglass*, 32 Conn. 393; *Bank of Bengal v. Radakissen Mitter*, 4 Moore, P. C. 140; *Field v. Holland*, 6 Cranch 8, 3 L. ed. 136; *Brewer v. Knapp*, 1 Pick. (Mass.) 332; *Upham v. Lefavour*, 11 Met. (Mass.) 174.

<sup>6</sup> *Wilson v. Dawson*, 52 Ind. 513 (1876).

<sup>7</sup> *Sieger v. Second National Bank*, 132 Pa. St. 307, 19 Atl. 217.

<sup>8</sup> § 563. While it is true that a bank has a right to apply deposits towards the discharge of a debt due it from a depositor, it is not obliged to do so. *Patterson v. State Bank*, 55 Ind. App. 331, 102 N. E. 880 (1913).

could not release without discharging the surety, but the bank would hold such security in trust for the surety. But a deposit is very different, and the fact that a depositor tells the bank to pay the note out of the deposit gave no new authority, and did not alter the case.<sup>1</sup> This has been pronounced a well-reasoned case, but its title to such praise is hard to discover. It is fundamental that no one should, by want of ordinary care, injure another, if the bank at the maturity of a note held by it holds funds that, by the scratch of a pen, it could apply upon the note, thus securing itself; it is difficult to see why neglecting so easy a means of security is not as improper as giving up collateral expressly designated for the purpose of securing the note. The privilege of delay in bringing suit is not analogy, it is a matter much more to be hesitated about, involving expense and ill feeling. And the distinction made by the judge between money deposited to pay a note and an order from the depositor to apply an existing deposit to its payment, could only come from one determined to drive preconceived theory through any quantity of adverse facts.

In *Bank of United States v. Carneal*,<sup>2</sup> Story said, in substance, "when a note is payable at a bank, it is the maker's duty to be at the bank within business hours to pay the same." In this case there were no funds when the note became due. In *National Mahaiwe Bank v. Peck*,<sup>3</sup> Gray said that a deposit is the property of the bank, and not of the depositor, and the right to apply it to a debt is in the nature of set-off, which, in the absence of express agreement or appropriation by the debtor, the bank will not be required so to appropriate for the benefit of the surety.<sup>3a</sup> Where the balance is in favor of the depositor at the maturity of a note held by the bank, it is a case of mutual debts and credits, which, except in bankruptcy or insolvency, neither the depositor nor his surety can require to be set off.

<sup>1</sup> *Second National Bank of Lafayette v. Hill*, 76 Ind. 223 (1881).

<sup>2</sup> 2 Pet. 543, 7 L. ed. 514.

<sup>3</sup> 127 Mass. 302. See also *Furber v. Dane*, 203 Mass. 108, 89 N. E. 227 (1909), holding that the beneficial owner of stocks indorsed in blank and which have been deposited as margin by a broker and by him deposited with a bank as security for a loan, has no right to require the bank to apply the balance of the broker's deposit to the payment of the note, and thus relieve the stock to that extent.

<sup>3a</sup> *Camp v. First National Bank*, 44 Fla. 497, 33 So. 241, 103 Am. St. Rep. 173 (1902); *Davenport v. State Banking Co.*, 126 Ga. 136, 54 S. E. 977, 115 Am. St. Rep. 68, n. (1906); but *quaere* if the bank knew that the depositor was insolvent. *Id.*

A bank, the payee and owner of an accepted bill, is under no duty to the acceptor to apply the drawer's deposit in payment of the bill.<sup>4</sup>

When S. guaranteed the overdraft of another and subsequently gave him a check on the bank, it is under no obligation to apply the check to the overdraft in the absence of information that the check was issued for that especial purpose.<sup>4a</sup>

§ 564. **Specific Deposit to pay Note on Acceptance.**—*Bank is agent of depositor, and cannot use deposit for other than the specified purpose.*—If the customer gives to his banker a specific sum for the express and declared purpose of enabling the banker to pay business paper of the customer made payable at the banker's, and if the banker at the time makes no objection to this arrangement, he cannot afterward apply this sum to any other purpose; as, for example, to reimbursing himself for any sum advanced by him to his customer on overdrafts, or to the payment of checks of the customer subsequently presented. Having received the sum for a certain specified purpose, he must hold it for and apply it to that purpose, and none other, at least so long as that purpose remains unaccomplished.<sup>1</sup>

If a note be made payable at a bank, and the maker deposits there in his own name a sufficient sum to meet the note, with verbal directions to the bank to use the funds for paying the note upon presentment, the bank is the agent, not of the payee, but of the maker of the note. If the bank refuses, for any reason, to make the payment upon due presentment and demand, the payee may have recourse to his legal remedies against the maker, as if the maker himself had refused. Thus, where the note in question was secured by a mortgage, and the refusal of the bank to honor it was upon an insufficient reason, it was nevertheless held that the payee might, as against the maker, proceed to foreclose the mortgage.<sup>2</sup>

<sup>4</sup> *Flournoy and Epping v. First National Bank*, 78 Ga. 229, 2 S. E. 547.

<sup>4a</sup> *People's Bank v. Stewart*, 152 Mo. App. 314, 133 S. W. 70 (1911).

<sup>1</sup> § 564. *De Bernales v. Fuller*, 14 East 590, n.; but see *Moore v. Bushell*, 27 L. J. Exch. 3; *Stebbins v. Lardner*, 2 S. D. 143, 48 N. W. 847.

<sup>2</sup> *Pease v. Warren*, 29 Mich. 9; *Kirkland Land and Improvement Co. v. Jones*, 18 Wash. 407, 34 Pac. 1043; *Alpena National Bank v. Greenbaum*, 74 Mich. 157, 41 N. W. 885; *St. Paul National Bank v. Cannon*, 46 Minn. 95, 48 N. W. 526. Suing the bank does not preclude the holder from afterwards bringing suit against the maker when the first suit does not result in satisfying his claim.

*Note-holder may Sue Bank*

(a) If money is deposited in a bank to pay a note drawn payable at the bank, the holder of the note can maintain an action against the bank for the fund.<sup>3</sup>

*Contra*

(b) But where the customer paid to his banker a certain sum, with the express contemporaneous stipulation that it should be used to take up a bill which he had accepted payable at the house of his banker's London correspondent, and afterward, upon the customer's becoming insolvent, and before the banker had advised his London correspondent to pay the bill, the banker appropriated the sum to meet the indebtedness of the customer to him, it was held that the drawers of the bill could not maintain an action against the acceptor's banker, on the ground of a lack of privity.<sup>4</sup> Though it might be inferred that, had the banker advised his correspondent to pay the bill, the decision might have been otherwise, and would then have been at variance with the foregoing Michigan case.

§ 564 A. **Certification of Notes.** — When notes are payable at a particular bank, there may be a usage for the bank to certify them. In such a case the bank becomes the debtor, as upon the certification of a check, and the parties to the note are discharged.<sup>1</sup> If the bank discovers that the funds are insufficient, it may save itself and hold prior parties by taking up the note, presenting it at its own counter, refusing payment, and notifying the said prior parties within the lawful time.<sup>2</sup>

National Park Bank *v.* Seele and Johnson Company<sup>3</sup> holds that where a note is certified, and the money paid, by a bank under a mistaken impression regarding the maker's deposit the money may be recovered, if the condition of the payee has not in any way been changed. It is difficult to conceive how the position of the payee can remain unchanged, inasmuch as the effect of certification is to discharge the parties to the note. Much more reasonable and in better accord with the general principles of certification

<sup>3</sup> Parsons on Com. Law, 130.

<sup>4</sup> Hill *v.* Royds, 8 L. R. Eq. 290.

<sup>1</sup> § 564 A. Meads *v.* Merchants' Bank, 25 N. Y. 148.

<sup>2</sup> Irving Bank *v.* Wetherald, 36 N. Y. 337.

<sup>3</sup> 58 Hun (N. Y.) 81.



is *Riverside Bank v. First National Bank*,<sup>4</sup> where it is held that certification, made under a misapprehension as to the sufficiency of the maker's deposit, cannot be rescinded.

§ 564 B. **Payment to the Bank.** — Where a note is payable at a bank, payment to the bank is not payment of the note unless the bank has received the note for collection.<sup>1</sup>

<sup>4</sup> 74 Fed. 276.

<sup>1</sup> § 564 B. *Bank of Montreal v. Dugerson*, 105 Iowa 384, 75 N. W. 351.

## CHAPTER XXXVI

### TITLE TO A DEPOSIT

#### A. AS BETWEEN BANK AND DEPOSITOR.

##### § 566. (1) DEPOSIT IN SAVINGS BANK.

Is in trust; the property remains in the depositor.

##### § 567. (2) SPECIAL AND SPECIFIC DEPOSITS.

When the identical thing deposited is to be restored or given to some third person, the property does not pass to the bank, as in case of a bill deposited "for collection", or money given the bank to pay a note.

##### § 568. GENERAL DEPOSIT.

Money deposited in a commercial bank without special agreement, or any circumstance (such as being sealed up in a box) indicating an intent to have the money kept separate, creates no trust, but the relation of debtor and creditor between the bank and the depositor, and the title passes to the bank.

And when a deposit arises from collections, the proceeds form a general deposit, except when the directions are to "collect and remit", in which case the bank is an agent throughout, and except in Wisconsin, where the proceeds of collections are always in trust.

##### § 569. (4) DEPOSIT OF PAPER.

(a) Checks on the depositary credited as cash pass to the bank just as if it paid the money and then the holder deposited the cash, unless there is a special agreement to the contrary, or a usage, as in California, allowing the bank to return the check. But if the check is forged, or is credited as *paper*, the bank may return it; and if it is not drawn against funds, and the holder knew this, the credit is not deemed a payment by the bank.

##### § 573. (b) NOTES, BILLS, CHECKS ON OTHER BANKS, ETC.

§ 583. If indorsed "for collection" or if credited as paper, the full title does not pass to the bank, though it may have a lien for advances on faith of the paper. But if credited as cash, the plain sense of the transaction is (1) that, as *against the depositor*, the title passes if the crediting as cash is with his consent, expressed, or implied from knowledge and acquiescence, or from a course of such dealing, and in case of the bank's insolvency, he cannot reclaim the specific paper.

## TITLE TO A DEPOSIT

- § 578. (2) That, as against the bank, the title passes by such crediting, subject, however, to the condition, that if the paper is not paid, it shall be returned to the depositor; this condition being imbedded in the transaction by the fact that banks continually claim and exercise this right, and by the justice of the case, since there is no consideration moving to the bank for its accepting any risk on the paper, and the security and despatch of business do not require any other rule. There is no counter-justice, for this rule is itself the one most favorable to the transaction of business; to which it may be added that discounting is an exclusive function of the board of directors, and cannot be exercised by the cashier or teller by crediting paper as cash, or in any other way; and further, that a credit of a note for its full amount is not a discount, for nothing is deducted; it is clearly only an ante-dated deposit, put in a lump with the money for convenience and in anticipation of its payment.

It will be found, on careful examination of the *facts* of the cases, and inquiring as to each, whether the question is against the depositor or the bank, and confining the broad language of the judges to the actual facts, that this rule covers and harmonizes the vast majority of the apparently so antagonistic decisions.

- § 583 *d.* But some remain really contrary.

- § 583 *b.* If paper is received without instructions, the bank may elect to receive it for collection or deposit, and the title does not pass till it makes the election by crediting it as cash.

- § 659. Deposit of forged notes is no deposit. See § 633 D.

- § 662. Notes of insolvent banks received on deposit. See § 633 D.

- (1) Subsequent insolvency is the loss of depositary bank.

- (2) Precedent insolvency.

- (a) If known to depositor, he must bear loss.

- (b) If not known to parties, authorities conflict.

- (c) PROCEEDS. See § 247.

When paper is collected, the general rule is, that the proceeds may be credited to the depositor on general account, and the bank becomes a debtor instead of a trustee. But this authority to credit such proceeds only continues while the bank is a going concern, and is revoked by its insolvency; and it is not allowed at all in Wisconsin, nor in any case where the instructions are to "collect and remit."

- § 568 *d.*

- § 567 *a.*

- (d) INSOLVENCY OF DEPOSITARY BANK

At time of deposit, known or unknown to the officers, is of itself no ground for recovery in preference to creditors in general; but the title does not pass if the money is kept separate from the bank's funds,

- § 589.

## TITLE TO A DEPOSIT

or was never fully received before insolvency, nor if receiving the deposit was a fraud on the depositor.

### (e) FRAUD.

§ 587 a.

On the part of the depositor will prevent him from

§ 569 b.

claiming that the title to paper deposited passed to the bank.

### B. AS BETWEEN A BANK AND THIRD PERSONS.

The bank's title to money or paper capable of identification by the true owner rests upon the principles of law that protect a *bona fide* holder for value, and, as the matter is very important, we give a brief analysis of the subject in a note on "Following Property."<sup>1 1a</sup>

NOTE 1. *Following Property*.—A *bona fide* purchaser for value without notice has an *equity of the highest rank*, but it cannot resist a *legal title*, except in the case of money and negotiable paper, where the interests of commerce have constrained the law to adopt the rule of equity. See *Lime Rock Bank v. Plimpton*, 17 Pick. (Mass.) 161.

It results that, when the real owner, O., of property is wrongfully deprived of it, —

First. If the original property can be traced and identified, and (a) if it is not money or negotiable paper, O. can recover it wherever he finds it, even in the hands of a *bona fide* holder; but (b) if it is money or negotiable paper, including negotiable stocks, O. may recover it from the wrongdoer, or one claiming from him and having notice; but not against a *bona fide* holder for value, or one claiming from him, other than the wrongdoer or fraudulent payee.

Second. If one intrusted with property, P., substitutes other property for P., and the real owner can trace it into its new form, the substituted property will be subject to the trust or claim of O. in the hands of the trustee or agent, or one with notice, but not as against a *bona fide* holder for value, or one claiming from him, except the agent or trustee. And a debt due from D. to the trustee, that can be shown to be a transformation of the original property, is within the meaning of the words "substituted property."

Third. If neither the original property nor its substitute can be traced into the hands of one from whom it can be recovered, then nothing remains but the liability of the trustee (T.) or agent. If T. is solvent, O. can claim in full, of course. If T. is insolvent, the best opinion is that O. has no better equity than any other creditor who has trusted T., though the contrary has been held.

It appears that a vendee can in two classes of cases get a good title in consequence of a sale by one who has no property in himself: —

(1) When an agent transfers the title of the real owner in virtue of authority from him, express or implied.

(2) When the circumstances create a new and independent title in the vendee; (a) by estoppel, as when the owner stands by and sees his property sold as that of another, and makes no objection; (b) by *bona fide* purchase for value of money or negotiable instruments.

Upon the above principles see *Story*, Eq. Jur. §§ 1258, 1259; *May v. LeClaire*, 11 Wall. 217, 20 L. ed. 50; *Lime Rock Bank v. Plimpton*, 17 Pick. (Mass.) 161; *Story on Agency*, §§ 229, 231; *Brook v. King*, 104 Iowa 713, 74 N. W. 683; *Re Assignment of Bank of Oregon*, 32 Or. 84, 51 Pac. 87.

In illustration: If A. (not having the legal title) sells O.'s horse with-

out authority, O. can assert his claim to the animal anywhere. But if A., a trustee, having the legal title, sells in violation of his trust, the *cestui* cannot follow the property into the hands of a *bona fide* holder for value; but if the transferee knew A. was violating his trust, the *cestui* can hold him as a new trustee. St. Eq. § 1258.

If a trustee wrongfully lays out the trust money in land, taking title to himself, equity will compel him to convey to the *cestui*.

If P. gives an agent money to buy a house, and he invests it in a carriage or in stocks, P. can maintain an action for that carriage or those stocks wherever he can find them, except in the hands of a *bona fide* holder for value. And where the principles of ratification apply, his suit may be at law.

One who accepts in good faith negotiable bonds deposited in a bank, transferred to him as a pledge by the cashier, acquires a good title, and a fraudulent recovery by the cashier cannot divest it. *Ringling v. Kohn*, 4 Mo. App. 59 (1877).

"As a general rule, where a trustee or agent has converted the subject of his trust or agency into money, and pays the same in the due course of business, in discharge of his own indebtedness, to one ignorant of the nature of his title, the payee acquires a perfect and indefeasible right against the real owner." *Charlotte Iron Works v. American Exchange National Bank*, 34 Hun (N. Y.) 26, 30; *Stephens v. Board of Education*, 79 N. Y. 183.

So always a transferee of negotiable paper takes at least as good a title as his transferor, if the transaction between them is good, except that if the instrument is invalid between maker and payee, the latter cannot, by purchase from a subsequent *bona fide* holder, acquire any better right than he had at first. It is not necessary to extend the principle of protection so far as this, for it is good faith that is to be protected, and it cannot be very important to an innocent indorsee that there is *one person* incapable of taking his title, and so unlikely to become a buyer. *Kost v. Bender*, 25 Mich. 516; *Sawyer v. Wiswell*, 9 Allen (Mass.) 42.

NOTE 1<sup>a</sup>. *Who is a Bona Fide Holder?* — No holder can enforce a negotiable instrument: — 1st. Against one incapable of making the contract it imports <sup>1</sup> (as an infant, lunatic, married woman, or one under guardianship).

2d. Nor if the contract which the instrument represents is by statute expressly or by necessary implication declared void <sup>2</sup> (as for usury; but even in such case the indorser may be liable on his indorsement, though the original party is not bound; <sup>3</sup> and although the consideration between the original parties was illegal, if the statute does not declare the note

<sup>1</sup> General principle of contract.

<sup>2</sup> *Hall v. Wilson*, 16 Barb. (N. Y.) 548; *Town of Eagle v. Kohn*, 84 Ill. 292; *Aurora v. West*, 22 Ind. 88; *Bayley v. Taber*, 5 Mass. 286; *Weed v. Bond*, 21 Ga. 195.

<sup>3</sup> An indorser warrants the genuineness of all the signatures prior to his own, the competency of the parties, validity of the contract, etc.; in short, warrants that the instrument is good, and that he has title, and that it will be paid; and if it is not, and the transaction between the indorser and indorsee was free from fraud or illegality, and for value, the latter may recover on the indorsement. *Bell v. Dagg*, 60 N. Y. 528; *Howe v. Merrill*, 5 Cush. (Mass.) 83; *Condon v. Pearce*, 43 Md. 83; *Hannum v. Richardson*, 48 Vt. 508; 1 *Parsons on Notes and Bills*, 218, 188; *Robertson v. Allen*, 3 Baxt. (Tenn.) 233. Even though the indorsee

or bill or other instrument *void*, a *bona fide* holder can recover <sup>4</sup> on it).

3d. Nor if the defendant has never given assent to the contract as it stands <sup>5</sup> (as if his signature is forged or obtained under duress, or the instrument has been materially altered, or if it was executed by an agent in excess of authority, the principal not being in fault).

(b) If the case does not fall within A, a holder of a negotiable instrument may recover upon it, even though originally obtained by fraud,<sup>6</sup> or without consideration,<sup>7</sup> or by theft,<sup>6</sup> or has been paid,<sup>8</sup> or released,<sup>9</sup> provided he took it, —

1st. Before maturity. (A note overdue carries suspicion on its face; it may have been paid and left outstanding.)

2d. Without notice of dishonor or infirmity as between prior parties. (A note may be dishonored before it is due by refusal to accept, and one knowing of this is ranged with one who takes after maturity,<sup>10</sup> and if the holder actually knew <sup>11</sup> of illegality, fraud, or defect of title between previous parties, or if he had *actual notice* <sup>12</sup> that *something was wrong*, though he did not inquire what, but wilfully shut his eyes to his suspicion, and the facts are really sufficient to impeach the validity of the instrument between former parties, he has no better position than his transferor.)

3d. *Bona fide*, — that is, in good faith. No matter if the holder be grossly negligent, it is not sufficient to impeach his position, but is only evidence for the jury on the question of bad faith. Kent (3 Comm. 103) follows *Gill v. Cubitt*, 3 Barn. & Cr. 466 (1824), in holding that, if the holder took under circumstances sufficient to excite the suspicion of a man knew the makers of a note were married women when he took it, he may recover of the indorser. *Erwin v. Downs*, 15 N. Y. 575.

<sup>4</sup> *Williams v. Cheney*, 3 Gray (Mass.) 215. See *Ultra Vires*, § 722.

<sup>5</sup> *The Floyd Acceptance*, 7 Wall. 666, 19 L. ed. 169; *Andover v. Graf-ton*, 7 N. H. 298; *Bush v. Brown*, 49 Ind. 573 (duress).

<sup>6</sup> See *Brown v. Spofford*, 95 U. S. 481, 24 L. ed. 510; *Goodman v. Simonds*, 20 How. 343; *Johnson v. Way*, 27 Ohio St. 374; *Central Bank v. Hammett*, 50 N. Y. 159; *Ogden v. Marchand*, 29 La. Ann. 61.

<sup>7</sup> *Collins v. Gilbert*, 94 U. S. 757, 24 L. ed. 173; *Bank of Pittsburg v. Neal*, 22 How. 96, 16 L. ed. 323; *Baxter v. Ellis*, 57 Me. 180; *Ross v. Bedell*, 5 Duer (N. Y.) 462; *Mechanics' Bank v. Crow*, 60 N. Y. 85; *Belmont Branch Bank v. Hoge*, 35 N. Y. 65; *Sloan v. Union Banking Co.*, 67 Pa. St. 470; *Davis v. Bartlett*, 12 Ohio St. 537. And though the indorsee *knew* the paper was given for accommodation, he may recover on it, though taken after maturity from one who took it *bona fide* before maturity, and the best opinion is that, even though he takes it with notice after maturity, and from the party for whose accommodation it was given, the want of consideration will be no defence to the maker; for he holds himself out as promising to pay any one who gives value, just the same as if it was paid to him, provided the conditions on which the accommodation is given are complied with, so far as the taker knew. *Daggett v. Whiting*, 35 Conn. 372; *Small v. Smith*, 1 Den. (N. Y.) 583; *Carruthers v. West*, 11 Q. B. (Eng.) 143; *Story on Bills*, 188; *Byles (Shars.)* 285; *Daniel*, *Neg. Inst.*, §§ 726, 786.

<sup>8</sup> *Swall v. Clark*, 51 Cal. 227.

<sup>9</sup> *Palmer v. Marshall*, 60 Ill. 289.

<sup>10</sup> *Crossley v. Ham*, 13 East. 498.

<sup>11</sup> *Hanauer v. Doane*, 12 Wall. 342, 20 L. ed. 439; *Skilding v. Warren*, 15 Johns. (N. Y.) 270; *Norvell v. Hudgins*, 4 Munf. (Va.) 496.

<sup>12</sup> *Hamilton v. Vought*, 34 N. J. L. 187; *Edwards v. Thomas*, 66 Mo. 486; *Perkins v. Challis*, 1 N. H. 254.

of ordinary prudence, he could not recover; but the vast weight of modern authority in England and the United States is in favor of *bona fides* as the test.<sup>13</sup>

4th. For value in the usual course of business. (One who acquires title by legal process, as a receiver or assignee in insolvency, does not take in the regular course of business, and is in no better position than the immediately preceding party.<sup>14</sup>

If *money or property is paid*, or a debt *satisfied or suspended*, or a new *obligation or responsibility incurred*, in consequence of the transfer of the instrument, the condition "for value" is fulfilled, and the holder protected against the antecedent equities; but upon the question whether receiving paper as collateral security for a pre-existing debt is a taking "for value", authority is not uniform. New York, Wisconsin, Tennessee, and Pennsylvania hold that such a transaction will not protect the holder, for the debt still subsists, and nothing of value has been given up,<sup>15</sup> nor has the holder changed his position to his detriment.

In England, Maryland, Massachusetts, New Jersey, Vermont, Illinois, and in the United States Supreme Court, a pre-existing debt is a sufficient consideration; <sup>16</sup> paper taken on account of such debt is, by implication, conditional payment, and the debt is suspended till the paper is mature, and a negotiable instrument taken as collateral for an existent debt is taken for value.

"The transaction possesses both the cardinal ingredients of a valuable consideration; it is a detriment to the promisee and an advantage to the promisor, and it is no answer to say that the party who takes such bill or note is in the same condition as he was before. This is by no

<sup>13</sup> *Smith v. Livingston*, 111 Mass. 342; *Edwards v. Thomas*, 66 Mo. 483; *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865; *Murray v. Lardner*, 2 Wall. 110, 17 L. ed. 857; *Goodman v. Simonds*, 20 How. 367, 15 L. ed. 942; *Seybel v. National Currency Bank*, 54 N. Y. 288; *Mabie v. Johnson*, 8 Hun (N. Y.) 309; *Phelan v. Moss*, 67 Pa. St. 62; *Brown v. Pettit*, 178 Pa. St. 17, 35 Atl. 865.

<sup>14</sup> *Litchfield Bank v. Peck*, 29 Conn. 384; *Roberts v. Hall*, 37 Conn. 205; *Briggs v. Merrill*, 58 Barb. (N. Y.) 379; *Billings v. Collins*, 44 Me. 271.

<sup>15</sup> *Moore v. Ryder*, 65 N. Y. 441; *Atlantic National Bank v. Franklin*, 55 N. Y. 238; *Wardell v. Howell*, 9 Wend. (N. Y.) 174; *Knox v. Clifford*, 38 Wis. 651; *Bowman v. Van Kuren*, 29 Wis. 220; *Heath v. Silverthorn Lead Mining Co.*, 39 Wis. 147; *Richardson v. Rice*, Cent. Law J., vol. vii., No. 12, p. 225 (Sept. 20, 1878); *Royer v. Keystone National Bank*, 83 Pa. St. 248; *Cummings v. Boyd*, 83 Pa. St. 732. But in *Grocers' Bank v. Penfield*, 7 Hun (N. Y.) 281, an accommodation holder indorsed notes to the bank to secure a balance, and the court held that an agreement for extension of time was implied. *Peacock v. Pursell*, 14 C. B. N. S. 728.

<sup>16</sup> *Poirier v. Morris*, 20 Eng. L. & Eq. 103; *Blanchard v. Stevens*, 3 Cush. (Mass.) 168; *Allaire v. Hartshorne*, 1 Zab. (N. J.) 665; *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865; *Goodman v. Simonds*, 20 How. 343, 15 L. ed. 934; *McCarty v. Roots*, 21 How. 432; *Manning v. McClure*, 36 Ill. 489; *Atkinson v. Brooks*, 26 Vt. 574; *Maitland v. Citizens' National Bank*, 40 Md. 540 (1874); 1 *Parsons on Notes and Bills*, 226; *Daniel*, § 827 *et seq.*; *Oates v. First National Bank of Montgomery*, 100 U. S. 239, 25 L. ed. 580 (collateral for previous debt; extension of time actually granted).

means certain. He has for the time foregone the collection of his debt, and in such matters time is of the essence of the transaction, and the debtor thereby gains time, — often a matter of the most vital importance.”

The creditor is lulled into security by means of the instrument; there is no telling what reliance he may have put upon it, nor what arrangement he might have made if it had not been for taking the paper. Only by showing absolutely that taking the paper from him does not put him in a worse plight than while he had it to rely upon, can the plaintiff justly recover from the creditor holding such paper as collateral security; and if this were so because the paper is worthless, it would not benefit the plaintiff to regain it; and if it were so because the holder could recover from his debtor who transferred the paper to him, then litigation will be saved by referring the plaintiff to the debtor, or still further back, *i. e.*, to the party actually in fault, if responsible, and if not, the innocent subsequent parties should not suffer for reliance upon the face of genuine paper.

This latter rule is certainly far better calculated to build up the stability of negotiable paper, and to facilitate commerce by increasing the certainty that business transactions will be sustained by the law as being what they appear to be. In short, the latter rule favors prevision, while the former clouds it, and no injustice is done to the parties held on such paper comparable to the social inconvenience that would follow from insecurity in financial dealings; and all the extra pressure brought to bear on such parties is in the direction of producing greater care on their part in the issuing and keeping of their paper.)

There does not, however, seem to be any reason why the true owner of negotiable paper may not recover it, on payment of the amount for which it is held as security.<sup>17</sup> The absolute title to the whole is not justly in the bank holding it as collateral for a debt only equal to a fraction of its amount. All that such holder can claim is, that, so far as reliance has been put on the paper *bona fide*, it shall be held harmless.

- § 590 *e.* (1) Money of P., deposited by D. in his own name, can be recovered by P. if the bank still owes it; that is, if the bank
- § 590 *b, c.* is not a holder for value in relation to the money. And this is true, whether the identical money can be traced or not.
- § 590. Some cases hold that money identified can be recovered, even
- § 590 *d.* though it has been applied by the bank upon indebtedness
- § 590 *e.* of the depositor to it in ignorance of the true ownership. This we do not consider good law, unless the bank still owes the depositor an amount equal to that recovered. See the principles of note 1.
- § 567 *d.* Money received in good faith in payment of debt cannot be recovered by the true owner. Of course, where money
- § 590 *a.* comes to a bank's possession out of the usual course of business, and with no intent to deposit it, no title passes as against the real owner.
- § 593. (2) Paper indorsed “for collection” carries notice of the indorser's ownership.
- § 591. (3) If paper is deposited for collection, but not so marked, and

<sup>17</sup> *New York M. Iron Works v. Smith*, 4 Duer (N. Y.) 362; *White v. Springfield Bank*, 3 Sand. (S. C.) (N. Y.) 222. See the principle in *Angele v. N. W. etc. Ins. Co.*, 92 U. S. 342, 23 L. ed. 561.



# TITLE TO A DEPOSIT

- § 592. U.S. is forwarded by the depositary to a correspondent, C.,
- § 592 b. Mo. and by the latter received without notice of the true owner-
- § 594. Ala. ship, and the depositary receives advances on the faith of
- Cal. such paper, or the correspondent receives it in payment or
- § 595. Mich. suspension of a debt, or suffers balances to remain against
- § 596. Ga. the depositary on the credit of paper transmitted or ex-
- § 597. Mass. pected to be transmitted in the usual course of dealing be-
- § 598. Eng. tween the banks, such paper cannot be recovered from the correspondent by the true owner. The bank is a holder for value.

- In New York an exception is made. One who takes paper as collateral security for a pre-existing debt is not a holder for value in the usual course of business; this is also the law in Pennsylvania, Tennessee, Wisconsin, and Connecticut. (New York, therefore, holds that taking paper as security for antecedent debt or a general balance will not protect a bank, but it must show some actual advance, or agreement for suspension of suit on a debt, or other actual change of position in consequence of the transfer of the paper. The vast weight of authority, however, is against the New York exception, and her own decisions are in great confusion, and were said by the United States Supreme Court, in *Swift v. Tyson*, to be based on a case in which the point was not decided on the facts, viz., *Coddington v. Bay*, 20 Johns. 637. It seems to us perfectly clear that New York and her followers are wrong; the depositor could most easily prevent all trouble by indorsing "for collection." If, by neglecting this precaution, he enables the depositary to use the paper as if it were its own, and the C. bank will sustain injury if the paper turns out not to belong to the depositary, then as between the two parties, the C. bank and the depositor, the latter has clearly enabled the first bank to impose upon C. The loss occasioned by the paper's not being what it appears to be must be borne by the one who put it forth with that appearance, not by him who received it in faith of its being what it purported.)

§ 582.

The maxim, "Between two innocent parties, etc.," applies here.

Every consideration of stability and certainty in commercial transactions points to the same conclusion. See further, note 1 a, and § 600.

- (4) If the bank holds the paper or its proceeds for less than its amount, the true owner may recover the excess, or, if the paper is still in the bank's possession, he may recover that on paying the bank the amount of its claim upon the paper. See the end of note 1.

## C. AS BETWEEN THE DEPOSITOR AND THIRD PARTIES, OR BETWEEN THIRD PARTIES.

Deposits in commercial banks.

- (1) In case of insolvency of the depositary bank.

(a) If the title passed to the bank under A and B (above), the depositor or true owner can claim no preference to the general creditors.

(b) If the title did not pass,

- (1) And the property can be identified in the hands of the bank, the owner is preferred.
- § 589 b. (2) If it cannot be identified, he has no better equity than any other person who has trusted the bank. Some cases, however, declare that a specific deposit may be recovered in full in preference to other claimants, although it has been mingled with the funds of the bank.
- § 567 a, b.  
§ 568 d.
- (2) Where an agent or trustee deposits money of his principal or *cestui*, the latter may claim the debt of the bank, if still due to the agent or trustee. It is not necessary, according to the best opinion, to identify the funds, if they can be traced through their changes so as to show that the debt which the bank owes the trustee is a transformation of the trust property. Of course, if the bank participates in the wrongful conversion of the property, that will create a liability; but if it is innocent in the matter, the question lies between third parties, and the *cestui* cannot recover from the bank beyond what is still due from it to the trustee.
- § 590 b.  
§ 590 e.  
§ 355.
- (3) Miscellaneous points.
- § 604. A deposit is presumed to belong to the depositor, and the additions, "Treas.", "Collector", etc., will not overcome the inference.
- (a) A trustee or agent depositing in his own name bears any loss that occurs by failure of the bank.
- (b) Deposit to husband and wife.
- (c) Deposit to order of A. or B.
- (d) Deposit to S., "Trustee for C. B.", may be drawn by the administrator of S.
- (e) Assignment of savings bank book and notice to bank carries the deposit.
- (f) Deposit contrary to law.
- (g) Recovery after death of agent.
- § 605. A specific deposit by A. to go to B. belongs to A., and not to B. until the bank binds itself to B. If the bank allows B. to draw by check part of the deposit, the remainder is held as the property of B.
- § 606. (4) A balance in bank passes by will under the words "money", "accounts due", etc.
- (5) Gift of deposit.
- § 606 a. Where adverse parties claim a deposit the bank may file a bill of interpleader.

§ 566. **Deposit in Savings Bank.** — In case of a deposit in a savings bank, the property remains in the depositor, and the bank is a trustee.<sup>1</sup>

<sup>1</sup> § 566. *Osborn v. Byrne*, 43 Conn. 155; *Bunnell v. Collinsville Savings Society*, 38 Conn. 203; *Simpson v. Savings Bank*, 56 N. H. 466; *Hall v. Paris*, 59 N. H. 71; *Sawyer v. Hoag*, 17 Wall. 610, 21 L. ed. 731; *Newark Savings Institution Case*, 28 N. J. Eq. 552; *Stockton v. Mechanics & Laborers' Savings Bank*, 32 N. J. Eq. 163; *Burrill v. Dollar Savings Bank*, 92 Pa. St. 134; *Huntington v. Savings Bank*, 96 U. S. 388, 24 L. ed. 777.

§ 567. **Special and Specific Deposits.**—When the very money or other thing deposited is to be restored,<sup>1</sup> or is given to the bank for some specified and particular purpose,<sup>2</sup> as to pay a certain note, or to act as agent for the collection of bills or notes deposited, the property does not pass from the depositor.<sup>2a</sup> When, however, the money is collected and credited, it becomes a general deposit,<sup>3</sup> unless the instructions are to *collect and remit*, and then, there being no authority to credit, the bank acts as agent throughout.

(a) C. sent a bill to the D. Bank for *collection, with specific instructions to remit the proceeds*. The bank received the money, and forwarded its draft to C. on a New York bank; this was dishonored and, the D. Bank becoming insolvent, the receiver was ordered to pay C. in full in preference to the general creditors.<sup>4</sup> The title to the bill did not pass, and the proceeds were held in trust. When D. receives the funds of C. he is deemed to hold them in a fiduciary capacity as bailee, or trustee, unless there is an understanding, express, or implied from the course of dealing or usage of business, that the same shall be turned into a debt.<sup>5</sup>

Such a deposit is within the meaning of statute, "money or other property" in the possession of the bank. *Brown v. Clark*, 80 Conn. 419, 68 Atl. 1001 (1908).

In Florida a depositor in a savings bank is not a *cestui* but a creditor of the bank and has the same right as a depositor in other banks. *Robinson v. Aird*, 43 Fla. 30, 29 So. 633 (1901); but in Connecticut it is not technically correct to say that "the relation between the savings bank and the depositor is that of a debtor and creditor." *Wood v. Connecticut Savings Bank*, 87 Conn. 341, 87 Atl. 583 (1913).

*Co-operative Bank.* A deposit in a co-operative bank by a minor not acting as the agent of her mother's estate but for herself and of her own money, which deposit is not beneficial to her and which is not made by way of a loan to the estate, may be rescinded without even putting the bank *in statu quo*. *Smith v. Equitable Co-operative Bank*, 219 Mass. 382, 106 N. E. 1020 (1914).

<sup>1</sup> § 567. *State v. Clark*, 4 Ind. 316; *Keene v. Collier*, 1 Met. (Ky.) 417.

<sup>2</sup> *Brahm v. Adkins*, 77 Ill. 263; *National Bank v. Speight*, 47 N. Y. 668; *Parker v. Hartley*, 91 Pa. St. 465; *Continental etc. Bank v. Chicago etc. Trust Co.*, 199 Fed. 704 (1912).

Where, without consideration, a bank receives from a money lender a sum of money to be delivered to one of his customers on a check drawn by such customer, the bank acquires no title thereto. *People's National Bank v. Wheeler*, 21 Okla. 387, 96 Pac. 619, 21 L. R. A. (N. S.) 816, n. (1908).

<sup>2a</sup> *Star Cutter Company v. Smith*, 37 Ill. App. 212.

<sup>3</sup> *Marine Bank v. Fulton Bank*, 2 Wall. 256, 17 L. ed. 785.

<sup>4</sup> *People v. Bank of Dansville*, 39 Hun (N. Y.) 187.

<sup>5</sup> *Libby v. Hopkins*, 104 U. S. 307, 26 L. ed. 769; *People v. City Bank*, 96 N. Y. 32. See *Hutchinson v. National Bank*, 145 Ala. 196, 41 So. 431 (1906).

M. left a draft with Bank H. for collection. H. sent it to Bank B., received credit, and drew on B. for the full amount. Before paying M., H. assigned for creditors. *Held*, that M. could recover in full from the assignee, as for a trust, though the specific funds could not be traced.<sup>6</sup> No change of state or form can divest trust property of its character as such. An abuse of a trust can confer no rights on the party abusing it, or on those claiming in privity with him. "If the proceeds of the trust can be traced into the estate of the defaulting agent or trustee, this is sufficient."<sup>7</sup> JJ. Cassoday and Taylor dissented, saying, "An equitable lien exists only when the trust money is directly or indirectly traceable to the fund sought to be charged."<sup>6</sup> Not only must it be traced to the estate for the agent, but to the fund in the hands of the assignee, and in this case it seemed to have been dissipated before the estate became insolvent.

Where a depositor takes to a bank, for discount, a note executed by himself, with another as surêty, and, on the refusal of the bank to discount it, he leaves it in his private pocket book in the bank vault, and the cashier after learning of the depositor's insolvency, and, without a request from him, takes the note from the vault and discounts it, and credits the proceeds against the depositor's overdraft, the surety cannot be held.<sup>7a</sup>

One who holds property expressly for a particular purpose cannot apply it to any other, and a bank cannot have a lien for a general balance on property deposited specifically.<sup>8</sup>

(b) When money is delivered to a bank for the express purpose of paying a note, the relation of principal and agent is created, not that of debtor and creditor; the deposit is a trust fund, and in case of an assignment for creditors this fund does not pass as

<sup>6</sup> *McCloud v. Evans*, 66 Wis. 401, 28 N. W. 173 (1886). See *National Bank v. Insurance Co.*, 104 U. S. 54, 26 L. ed. 693; *Van Alen v. American National Bank*, 52 N. Y. 1; *Farmers and Mechanics' National Bank v. King*, 57 Pa. St. 202; *People v. City Bank of Rochester*, 96 N. Y. 32; *Peak v. Ellicott*, 30 Kan. 156, 1 Pac. 499; *American Can Co. v. Williams*, 176 Fed. 816 (1908). But in order to recover the proceeds must be traced into the assets of the bank, or have culminated on the general assets or added a gain thereto. *American Can Co. v. Williams*, 178 Fed. 420 (1910).

<sup>7</sup> Story, Eq. Jur., § 1258; *Heidelberg v. National Park Bank*, 87 Hun (N. Y.) 117.

<sup>7a</sup> *National Bank v. Flanagan*, 129 Mo. 178, 31 S. W. 773.

<sup>8</sup> *Davis v. Bowsher*, 5 Term 488; *Jarvis v. Rogers*, 15 Mass. 389. A pledge for a special loan cannot be retained for a prior debt. *Continental etc. Bank v. Chicago etc. Trust Co.*, 199 Fed. 704 (1912).

assets of the bank, but may be recovered in full.<sup>9</sup> But if the money has been mingled with the funds of the bank, as is usually the case, there is no reason why the depositor should be preferred above any other. He has trusted the bank, so have the others.<sup>9a</sup> See the principle in the Illinois Trust & Savings Bk. Case, 21 Blatchf. 275. It is the usual custom to receive money to pay a note in the same way as on general deposit and to mingle it with the funds of the bank, and there does not seem to be any substantial difference except that the bank cannot claim a lien upon such funds. The plain fact seems to be that the bank owes the amount of the note to the note-holder, payable at its maturity, and it is hard to see why he should be preferred to any other person having money in the bank's possession. However, the word "trust" seems to have led to the giving of preference in some cases, even though the funds are handled (as a matter of business fact) in just the same way as where the word "debt" is applied.

(c) A., the maker of a note payable at the B. Bank, gave the bank a check expressly to pay the note, and the bank charged the check to A.'s account, and marked it "Paid", and failed before actually paying the note. It was held that the funds were held in trust by the receiver to pay the holder of the note in full.<sup>10</sup> When, however, a bank, in pursuance of an order from the depositor, sends to another bank money to pay a bill of the depositor, and the first bank fails before the bill comes due, there is no reason to allow the creditors of the first bank to claim any share in such funds; they have gone from its possession, and been appropriated to the bill, and put in the hands of the second bank for the purpose of paying it; it has become a deposit in the second bank, not in the first.<sup>11</sup>

### *A Bank Transmitting Money Acts as Agent*

A city treasurer drew his checks on the city's banker, M., with instructions to transmit the amount to the R. Bank in New York

<sup>9</sup> *Ellicott v. Barnes*, 31 Kan. 170, 1 Pac. 499; *Peak v. Ellicott*, 30 Kan. 156, 1 Pac. 767; *Kimmel v. Dickson*, 5 S. D. 226, 58 N. W. 561; *Anderson v. Pacific Bank*, 112 Cal. 598, 44 Pac. 1063.

<sup>9a</sup> *Bank of Florence v. United States Savings and Loan Co.*, 104 Ala. 297, 16 So. 110; *Bank's Assigned Estate*, *Carmany's Appeal*, 166 Pa. St. 622, 31 Atl. 334.

<sup>10</sup> *People v. City Bank*, 96 N. Y. 32, citing *Libby v. Hopkins*, 104 U. S. 303, 26 L. ed. 769.

<sup>11</sup> *Farley v. Turner*, 26 L. J. N. S. 710.

to pay a debt of the city there. Judge Dillon said: "It is my judgment that the relation between the Missouri bank and the city, as respects the money deposited with the Bank of the Republic, was not that of debtor and creditor strictly, but that of principal and agent, with the duties and liabilities of the latter, and not those of the former relation. The moneys deposited by the Missouri bank in its name with the Bank of the Republic were, as between the former bank and the city, trust moneys, and in equity they belong to the city."<sup>12</sup>

(d) Where the cashier of a bank negotiates a loan upon real estate and by agreement of the parties receives the money to be paid to the owner of such real estate, such agreement does not constitute the party entitled to the money a voluntary creditor or depositor of the bank.<sup>12a</sup>

*Proceeds of Collection Diverted to Pay Debt of the Collecting Bank the Creditor Bank, being Innocent, Holds*

(e) The Charlotte Iron Works held a draft payable by D. on the 19th of December, and sent it to the C. Bank for collection. The latter forwarded it to the A. Bank, ordering it to send the proceeds to the E. Bank to pay the C.'s debt to the E. The A. collected and remitted to the E., stating that the funds were to be applied to the C.'s indebtedness to the remittee. The E. accordingly credited to the C.'s account the money received from the payment of the draft sent by A. The collection by A. was on the 19th, the cash on its draft was received through the clearing-house on the 20th, and at three o'clock on the 19th the C. had closed its doors insolvent. As the E. Bank had in good faith applied the fund on the indebtedness of the C. to it, receiving it as payment on the same, just as if cash had been remitted to it by A. for that purpose, it was declared to be a *bona fide* holder for value, and entitled to retain the money.<sup>13</sup>

§ 568. **Money deposited in a Commercial Bank, and the Proceeds of Collection.** — *When title passes to the bank.* — The simple deposit of money on account is a general deposit, and transfers

<sup>12</sup> St. Louis v. Johnson, 5 Dill. 241. See also Moreland v. Brown, 86 Fed. 257.

<sup>12a</sup> State v. State Bank, 42 Neb. 896, 61 N. W. 252.

<sup>13</sup> Charlotte Iron Works v. American Exchange National Bank, 34 Hun (N. Y.) 26. See Indig v. National City Bank, 80 N. Y. 100; Turner v. Bank, 3 Keyes (N. Y.) 425; Justh v. National Bank, 56 N. Y. 478.

the ownership of the money to the bank.<sup>0</sup> The ordinary relation existing between a bank and its customer, if not complicated by any further transaction than that of the depositing and withdrawing of moneys by the customer from time to time, is simply that of debtor and creditor at common law. The original and every subsequent deposit by the customer is in strict legal effect a loan by the customer to the bank. Efforts have been made to hold banks to the duties and responsibilities of trustees in respect to the sums on deposit with them, also to hold them as agents of the depositor, but these have uniformly failed both in England and in the United States; and the general doctrine as laid down above is sustained by a great weight of authority.<sup>1</sup>

<sup>0</sup> § 568. This is true even though the money is received for transmission. *Engel v. O'Malley*, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. 190 (1910), and when a vendor deposits in a bank a draft given him in payment of goods and the bank credits the amount thereof to his general account the vendee has no claim against the bank because of fraud of the vendor or failure of delivery of the goods. *Reed Grocery Co. v. Canton National Bank*, 100 Md. 299, 59 Atl. 716, 70 L. R. A. 959 (1905).

<sup>1</sup> English cases: *Foley v. Hill*, 2 H. L. Cas. 39; *Crosskill v. Bower*, 32 Beav. 86; *Carr v. Carr*, 1 Mer. 541, n.; *Bishop v. Countess of Jersey*, 2 Drew. 143; *Devaynes v. Noble*, 1 Mer. 541; *Bellamy v. Majoribanks*, 8 Eng. L. & Eq. 517; *Sims v. Bond*, 6 Barn. & Ad. 392; 2 Nev. & Man. 608; *Watts v. Christie*, 11 Beav. 546; *Pott v. Clegg*, 16 M. & W. 321; *In re Agra & Masterman's Bank, Ex parte Waring*, 36 L. J. Ch. 151; *Grant on Bankers and Banking*. American cases: *National Bank v. Eliot Bank* (in which, however, there is a long dissenting opinion, delivered by Abbott, J.) 20 Monthly Law Rep. o. s. (Boston) 138; 10 Monthly Law Rep. n. s. 138; *Commercial Bank of Albany v. Hughes*, 17 Wend. (N. Y.) 94; *Bullard v. Randall*, 1 Gray (Mass.) 605; *Chapman v. White*, 2 Seld. (N. Y.) 412; *Downes v. Phoenix Bank*, 6 Hill (N. Y.) 297; *Foster v. Essex Bank*, 17 Mass. 479; *Bank of Northern Liberties v. Jones*, 42 Pa. St. 536; *Marsh v. Oneida Central Bank*, 34 Barb. (N. Y.) 298 (citing many authorities); *Curtis v. Leavitt*, 15 N. Y. 9; *National Bank of the Republic v. Millard*, 10 Wall. 152, 19 L. ed. 897; *Marine Bank v. Fulton Bank*, 2 Wall. 252, 17 L. ed. 785; *State v. Bartley*, 39 Neb. 353, 58 N. W. 172; *Merchants and Planters' Bank v. Meyer*, 56 Ark. 499, 20 S. W. 406; *Blake v. State Savings Bank*, 12 Wash. 619, 41 Pac. 909; *Bank v. Brewing Co.*, 50 Ohio St. 151, 33 N. E. 1054; *Schram v. Cartwright*, 4 Dist. R. (Pa.) 632; *Smith's Cash Store v. First National Bank*, 149 Cal. 32, 84 Pac. 663, 5 L. R. A. (n. s.) 870, n. (1906); *Plumas County Bank v. Bank of Rideout*, 165 Cal. 126, 131 Pac. 360, 47 L. R. A. (n. s.) 552, n. (1913); *Newmark Grain Co. v. Merchants' National Bank*, 166 Cal. 203, 135 Pac. 958 (1913); *Gonyer v. Williams*, 168 Cal. 452, 143 Pac. 736 (1914); *Dirnfeld v. Fourteenth Street Sav. Bank*, 37 App. Cas. (D. C.) 11 (1911); *Camp v. First National Bank*, 44 Fla. 497, 33 So. 241, 103 Am. St. Rep. 173 (1902); *Miami v. Shutts*, 59 Fla. 462, 51 So. 929 (1910); *Davenport v. State Banking Co.*, 126 Ga. 136, 54 S. E. 977, 115 Am. St. Rep. 68, n. (1906); *McGregor v. Battle*, 128 Ga. 577, 58 S. E. 28, 13 L. R. A. (n. s.) 185, n. (1907); *Luthersville Banking Co. v.*

*Deposit Presumed to be General*

(a) If coin or currency, "not in a sealed packet or closed box, bag, or chest, is deposited with a bank or banking corporation, the law presumes it to be a general deposit, until the contrary appears;<sup>1a</sup> because such deposit is esteemed the most advantageous to the depositary, and most consistent with the general objects, usages, and course of business of such companies or corporations. But if the deposit be made of anything sealed or locked up, or otherwise covered or secured in a package, cask, box, bag, or chest, or anything of the kind of or belonging to the depositor, the law regards it as a pure or special deposit, and the depositary as having the custody thereof only for safe-keeping and the accommodation of the depositor."<sup>2</sup> All the sums paid into the bank on general deposit, by the same or different depositors, form one blended fund.<sup>3</sup> So soon as the money has been handed over to the bank, and the credit given to the payer, it is at once the proper money of the bank. It enters into the general fund and capital, and is undistinguishable therefrom. Thereafter the depositor has only a debt owing him from the bank; a chose in action, not any specific money, or a right to any specific money.<sup>4</sup>

Hopkins, 12 Ga. App. 488, 77 S. E. 589 (1912); Bank of Blakely v. Buchanan, 13 Ga. App. 793, 80 S. E. 42 (1913); McBee v. Purcell National Bank, 1 Ind. T. 288, 37 S. W. 55 (1896); Shopert v. Indiana National Bank, 41 Ind. App. 474, 83 N. E. 515 (1907); Beard v. Peoples' Savings Bank, 53 Ind. App. 185, 101 N. E. 325 (1913); Woodhouse v. Crandall, 197 Ill. 104, 64 N. E. 292, 58 L. R. A. 385 (1902); First Denton National Bank v. Kenney, 116 Md. 24, 81 Atl. 227, 1913B Ann. Cas. 1337, n. (1911); Peabody v. Citizens' Savings Bank, 98 Minn. 302, 108 N. W. 272 (1906); Butcher v. Butler, 134 Mo. App. 61, 114 S. W. 564 (1908); Citizens' State Bank v. Worden, 95 Neb. 53, 144 N. W. 1064 (1914); *Ex parte* Rickey, 31 Nev. 82, 100 Pac. 134, 135 Am. St. Rep. 651 (1909); Fricano v. Columbia National Bank, 118 App. Div. 567 (1907), 103 N. Y. S. 189; Shuman v. Citizens' State Bank, 27 N. D. 599, 147 N. W. 388, 1915A L. R. A. 728; People's National Bank v. Wheeler, 21 Okla. 387, 96 Pac. 619, 21 L. R. A. (n. s.) 816, n. (1908); Commonwealth v. Stone, 236 Pa. St. 35, 84 Atl. 659 (1912); State v. Clement National Bank, 84 Vt. 167, 78 Atl. 944 (1911); Miller v. Norton, 114 Va. 609, 77 S. E. 452 (1913); Carlson v. Kies, 75 Wash. 171, 134 Pac. 808 (1913); Burton v. United States, 196 U. S. 283, 49 L. ed. 482, 25 Sup. Ct. 243 (1906).

<sup>1a</sup> Nichols v. State, 46 Neb. 715, 65 N. W. 774.

<sup>2</sup> Dawson v. Real Estate Bank, 5 Ark. 297.

<sup>3</sup> Devaynes v. Noble, 1 Mer. 541; Bodenham v. Purchas, 2 Barn. & Ald. 39; Henniker v. Wigg, 4 Q. B. (Ad. & El. n. s.) 792; Commercial Bank of Albany v. Hughes, 17 Wend. (N. Y.) 94.

<sup>4</sup> Marine Bank v. Fulton Bank, 2 Wall. 252, 17 L. ed. 785; Thompson v. Riggs, 5 id. 663, 18 L. ed. 704; National Bank of the Republic v. Millard,



(b) A deposit is not special unless made so by agreement or directions of the depositor, or by such circumstances as being enclosed in a box, or other matter indicative of intent not to make a general deposit, or unless made in a particular capacity which indicates such intent.<sup>5</sup> A public deposit blended with the general funds of the depository,<sup>6</sup> or money deposited by a receiver appointed by the court,<sup>7</sup> or a deposit in the name of C. D., "Clerk",<sup>8</sup> does not constitute a special deposit.

(c) Two banks, the C. and the I., agreed that the C. should act as the I.'s agent for clearing-house purposes, the I. to keep on deposit with the C. a sum to meet the checks put through. *Held*, that such deposits became the property of the C., and upon the C.'s bankruptcy the balance vested in the C.'s assignee. The relation was simply that of debtor and creditor between the banks.<sup>9</sup>

(d) When deposits arise from collection on behalf of a correspondent the relation of debtor and creditor is created.<sup>10</sup> But in Wisconsin a collecting bank holds the proceeds in trust, and payment must be made in full in preference to general creditors, even though the specific money cannot be traced.<sup>11</sup> In Illinois, if the proceeds of collection are mingled with the other funds of the bank, they are governed by the rules relating to general deposits, and if they depreciate it is the bank's loss.<sup>12</sup>

### *No Authority to Credit Proceeds of Collection after Insolvency*

A bank,<sup>13</sup> upon receiving from L. a draft indorsed "for collection on his account", provisionally credited him with it, pre-  
10 *id.* 152, 19 L. ed. 897; *Ætna National Bank v. Fourth National Bank*, 46 N. Y. 82; *Carr v. National Security Bank*, 107 Mass. 45; *First National Bank v. Ocean National Bank*, 60 N. Y. 278.

<sup>5</sup> *Brahm v. Adkins*, 77 Ill. 263; *Ruffin v. Commissioners*, 69 N. C. 498; *Neely v. Rood*, 54 Mich. 134, 19 N. W. 920.

<sup>6</sup> *Otis v. Gross*, 96 Ill. 612. See *Brown v. Sheldon State Bank*, 139 Iowa 83, 117 N. W. 289 (1908).

<sup>7</sup> *Southern Devel. Co. v. Houston*, 27 Fed. Rep. 344.

<sup>8</sup> *McLain v. Wallace*, 103 Ind. 562, 5 N. E. 911.

<sup>9</sup> *Phelan v. Iron Mountain Bank*, 4 Dillon 88 (1877).

<sup>10</sup> *Phoenix Bank v. Risley*, 111 U. S. 125, 28 L. ed. 374, 4 Sup. Ct. 580; *People v. Merchants & Mechanics' Bank*, 78 N. Y. 269. If the depositor of the paper has an account at the bank, the proceeds are rightly credited to him on general account; if he is not a general depositor, the bank may start an account with the proceeds. *Marine Bank v. Rushmore*, 28 Ill. 463; *Tinkham v. Hayworth*, 31 Ill. 519.

<sup>11</sup> *McLeod v. Evans*, 66 Wis. 401, 28 N. W. Rep. 173.

<sup>12</sup> *Marine Bank v. Rushmore*, 66 Wis. 401, 28 Ill. 463.

<sup>13</sup> *Levi v. National Bank of Missouri*, 5 Dillon 104 (1878); *First Na-*

sented it for payment, and surrendered it to the drawee on receiving his check for the amount; but instead of demanding the money thereon, had the checks certified as good, and on the same day suspended payment. The next day the check was collected and the money mingled with other money in the hands of the receiver. It was decided that he held it in trust for L. The bank had no authority to take anything but money. Receiving a check and having it certified was not a completion of its agency to collect. That duty terminated only with payment of the check, and only then did the authority to credit arise,<sup>13a</sup> if the bank was still a going concern. But the bank became insolvent before the agency was completed and the money received, so that no authority existed to credit the money on general account, and it was still trust money at the time it went into the hands of the receiver, and, being clearly traced into his hands, may be recovered.

When a check is left at a bank for collection with instructions that the proceeds are to be applied to the debt of the depositor to the bank but the note is not assigned to the bank as collateral security, the title of the bank is subject to all equitable defences that could have been enforced against the payee.<sup>13b</sup>

§ 569. **Check on Depositary.** (Ala., N. Y., U. S., Cal., N. J.) — When a check is presented for deposit drawn on the depositary bank, the bank may refuse to pay it, or take it conditionally by express agreement, or by usage, if such a one exists, as in California;<sup>1</sup> but otherwise, if it pays the money, or gives credit to the depositor, the transaction is closed between the bank and the

tional Bank *v.* First National Bank of Richmond, 76 Ind. 561 (1881). So in Texas collection subsequent to insolvency is held by the bank in trust. German American Bank *v.* Third National Bank, 2 Texas L. J. 150. See also Kinney & Co. *v.* Paine, 68 Miss. 258; Pennington *v.* Third National Bank, 114 Va. 674, 77 S. E. 455, 45 L. R. A. (N. S.) 781, n. (1913); Hutchinson *v.* National Bank, 145 Ala. 196, 41 So. 143 (1906), where there was specific instructions as to remittance of the proceeds of collection.

<sup>13a</sup> See Commonwealth National Bank *v.* First National Bank, 158 Ky. 392, 165 S. W. 398 (1914).

<sup>13b</sup> Schneider *v.* Johnson, 161 Mo. App. 375, 143 S. W. 78 (1911).

<sup>1</sup> § 569. In San Francisco there is a legally sanctioned usage to return a check deposited in the bank on which it is drawn, if the fact that the drawer has not sufficient funds to his credit is discovered during banking hours of the day of deposit. National Gold Bank *v.* McDonald, 51 Cal. 64. See Pollack *v.* National Bank, 168 Mo. App. 368, 151 S. W. 744 (1912).

depositor, unless the paper proves not to be genuine, or there is fraud on the part of the depositor.<sup>2</sup> The giving of credit is practically and legally the same as paying the money to the depositor, and receiving the cash again on deposit.<sup>3</sup> The intent of the parties must govern,<sup>3a</sup> and presenting a check on the bank, with a pass-book in which the receiving teller notes the amount of the check, is sufficient indication of intent to deposit, and to receive as cash.<sup>4</sup> So a credit on the deposit ticket is as significant an act of receiving the check as cash as is a credit on the pass-book or the books of the bank.<sup>5</sup> *California contra.*<sup>6</sup>

### *Credit of Check on the Depositary is Payment*

In Alabama a check drawn on the C. Bank was credited on the depositor's pass-book and on the books of the bank, and put on the file of paid checks. *Held*, that the depositary could not return the check on discovery that it was an overdraft and the drawer insolvent.<sup>7</sup>

<sup>2</sup> *Oddie v. National Bank*, 45 N. Y. 735. *American National Bank v. Miller*, 229 U. S. 517, 57 L. ed. 1310, 33 Sup. Ct. 883 (1913). Mistake of the officer making the credit, as to the funds of the drawer, will not give the bank any right to repudiate the transfer. *Chambers v. Miller*, 13 Com. B. N. s. 125; *National Bank v. Burkhardt*, 100 U. S. 686, 25 L. ed. 766; *Levy v. United States Bank*, 4 Dall. 234, 1 L. ed. 814; *Inter-State National Bank v. Ringo*, 72 Kan. 116, 83 Pac. 119, 115 Am. St. Rep. 176, 3 L. R. A. (N. s.) 1179, n. (1905). Where the depositor knows that the drawer has not sufficient funds, the bank is not held to have paid the check. *Peterson v. Union National Bank*, 52 Pa. St. 206.

<sup>3</sup> *Market v. Hartshorne*, 3 Keyes (N. Y.) 137; *Levy v. Bank*, 4 Dall. 235, 1 L. ed. 814; *Bolton v. Richard*, 6 Term 139; *City National Bank v. Burns*, 68 Ala. 267; *People v. St. Nicholas Bank*, 77 Hun (N. Y.) 159; *People v. Sheppard*, 37 App. D. (Hun, N. Y.) 119; *State v. Salmon*, 216 Mo. 466, 115 S. W. 1106 (1909); *Miller v. Norton*, 114 Va. 609, 77 S. E. 452 (1913); *Pennington v. Third National Bank*, 114 Va. 674, 77 S. E. 455, 45 L. R. A. (N. s.) 781, n. (1913); *American National Bank v. Miller*, 229 U. S. 517, 57 L. ed. 1301, 33 Sup. Ct. 883 (1913); *Montgomery County v. Cochran*, 126 Fed. 456 (1903). The fact that the funds to the credit of the drawer are composed of checks drawn to his order and which are subsequently dishonored is immaterial. It is also immaterial that the check was given as a result of a gambling transaction. *Bryan v. First National Bank*, 205 Pa. St. 7, 54 Atl. 480 (1903).

<sup>3a</sup> *Pollack v. National Bank*, 168 Mo. App. 368, 151 S. W. 774 (1912); *State v. Salmon*, 216 Mo. 466, 115 S. W. 1106 (1909).

<sup>4</sup> See authorities in notes 2 and 3 *supra*.

<sup>5</sup> *Market v. Hartshorne*, 3 Keyes (N. Y.) 137.

<sup>6</sup> *National Gold Bank v. McDonald*, 51 Cal. 64.

<sup>7</sup> *City National Bank of Selma v. Burns*, 68 Ala. 267 (1880).

*If the Holder Knows there are No Funds his Demand may be Fraud,  
but the Scienter must be Clearly Proved*

But if the check was not drawn against funds and the holder knew it, the credit is not deemed a payment by the bank.<sup>8</sup> If the holder has knowledge that the drawer has no funds, and has no just reason to think the check will be honored in the absence of funds, he is guilty of fraud, especially if he knows the drawer is insolvent and the bank does not. So it was argued. The Chief Justice said, "If we concede the proposition in its broadest terms, knowledge of the want of funds must be traced to the holder. It is fraud which is imputed to him, and the scienter should be clearly proved."<sup>8</sup>

**In Georgia** at the time of a deposit by a defendant with bill of lading attached the drawer had overdrawn its accounts and the deposit was entered as cash to its credit. The drawer was not only accustomed to draw against deposits of this character but actually overdrew. The court held that "these circumstances evince the parties' intention to treat the draft as a deposit of money, and therefore the title to the draft and bill of lading is in the bank."<sup>9</sup>

§ 570. **In New Jersey** the doctrine is very clearly stated in a case<sup>1</sup> where two checks on the depositary were in dispute. "They were received and credited in a cash account as cash, in part as payment of an overdraft, and in part to be drawn against. They were received and credited in the same way as bills or notes of other banks. *By such crediting, the bank became the owner of these checks, as they do of legal tender notes or bank bills so deposited.* And had the defendants failed the next day, the plaintiffs could not have demanded these identical checks as their property, left for collection, against a receiver or an assignee in bankruptcy; the plaintiffs had *received the price of these checks by having it credited on their overdraft, and by drawing for it.*"

§ 571. **In New York** it is held that the bank is bound at all times to know the condition of the depositor's account; that if the check of a depositor is presented at the bank on which it is

<sup>8</sup> Peterson v. Union National Bank, 52 Pa. St. 206.

<sup>9</sup> National Bank v. Everett, 136 Ga. 372, 71 S. E. 660 (1911); Alexander v. First National Bank, 140 Ga. 266, 78 S. E. 1070 (1913).

<sup>1</sup> § 570. Titus v. Mechanics' National Bank, 35 N. J. L. 592. See the same decision in Hoffman v. First National Bank, 46 N. J. L. 604; Terhune v. Bank, 34 N. J. Eq. 367.

drawn, and payment of the sum called for is made thereon, or if it is offered for deposit and credit is given upon the bank-book of the person offering it, the bank cannot afterward recover back the amount paid, or refuse to recognize the credit given, because the check proves to be an overdraft. "The bank," say the court, "has always the means of knowing the state or the account of the drawer, and if it elects to pay the paper it voluntarily takes upon itself the risk of securing itself out of the drawer's account or otherwise." If the check be presented for deposit, it will naturally be presented to the "receiving", instead of to the "paying" teller; but this fact was declared not to affect the foregoing rule. The receiving teller has equal power with the paying teller to discover the condition of the drawer's account before giving the credit. A bank simply receiving a check drawn upon itself by one of its depositors, and offered for deposit by another of its depositors, and giving credit upon the latter depositor's bank-book in the ordinary manner, is estopped afterward to say that it received the check only for collection, though it may by express words make the receipt and credit conditional.<sup>1</sup>

§ 572. **In Pennsylvania** it is held that the officers of the bank, having dealt with the check in the ordinary form, have placed the bank only under the ordinary obligation; to wit, that of collecting the check in due course of business for the benefit of the depositor. The collection is not complete, and the bank does not become indebted to the depositor for the amount, until the credit has been actually transferred.<sup>1</sup> But nevertheless the depositor enjoys one advantage in this case which he would not enjoy if the check were upon another bank. The duty of applying the funds of the drawer to meet it accrues as soon as the bank receives it. If there are then, or if there should subsequently be, deposited, while the bank holds possession of the check, funds to the credit of the drawer to the amount of the check, the bank is bound to apply them to the payment of this in preference to any other check which shall be presented, or probably to any other claim or lien which shall accrue, *after* the deposit of this check. Liens already fastened upon the drawer's balance will, of course, be entitled still to retain their precedence. Though, where the drawer

<sup>1</sup> § 571. *Oddie v. National City Bank*, 45 N. Y. 735.

<sup>1</sup> § 572. *Peterson v. Union National Bank*, 52 Pa. St. 206; *National Gold Bank v. McDonald*, 51 Cal. 64; *Boyd v. Emerson*, 2 Ad. & El. (Eng.) 184; *Kilsby v. Williams*, 5 Barn. & Ald. 815. See *Pollard v. Ogden*, 2 E. & B. 459.

was indebted to the bank at the time, and the bank, without mentioning the fact, simply promised the depositor to hold the check for the purpose of applying upon it any deposits that might be thereafter made, it was held that such subsequent deposits must be first devoted to the payment of the check, although the indebtedness still remained undischarged and unsecured.<sup>2</sup> But if at the time when the holder hands in the check he demands to have it placed to his credit, and is informed that it shall be done, or if he holds any other species of conversation which practically amounts to demanding and receiving the promise of a transfer of credit as equivalent to an actual payment, the effect will be the same as if he had received his money in cash, and the bank's indebtedness to him for the amount will be equally fixed and irrevocable.<sup>2</sup> If a check is credited as cash to a depositor, and interest paid on his balance, of which the check is a part, it is a cash deposit.<sup>3</sup>

§ 573. **Paper deposited in a Commercial Bank.** — If checks, notes, etc., are deposited for collection, credited to the depositor on general account<sup>0</sup> and *drawn against*,<sup>0a</sup> the bank is holder of the paper for value,<sup>0b</sup> and if it becomes insolvent, it forms part of its assets.<sup>1</sup> And if the drawer's account is overdrawn at the

<sup>2</sup> *Boyd v. Emmerson*, 2 Ad. & El. 184.

<sup>3</sup> *Foulker v. Union Banking Co.*, 6 W. N. Cas. (Phil.) 109.

<sup>0</sup> § 573. The giving credit by a bank constitutes a *prima facie* sale. *Downey v. National Exchange Bank*, 52 Ind. App. 672, 96 N. E. 403 (1912). See *Mudd v. Farmers' etc. Bank*, 175 Mo. App. 398, 162 S. W. 314 (1913).

<sup>0a</sup> If the depositor owes the bank and credit is given on the overdraft for the amount of the draft the bank is a purchaser for value. *Latham v. Spragins*, 162 N. C. 404, 78 S. E. 282 (1913).

<sup>0b</sup> If the paper is intended to be deposited for collection only it does not become the property of the bank even if the depositor has been allowed to check against the deposit before the paper is collected. *Greenburg National Bank v. Syer*, 113 Va. 53, 73 S. E. 438.

<sup>1</sup> *In re Bank of Madison*, 5 Biss. 515; *Ayres v. Farmers & Merchants' Bank*, 79 Mo. 421; *St. Louis v. Johnston*, 27 Fed. 243; *Balbach v. Frelinghuysen*, 15 Fed. 675, which last goes a little beyond the principle of *bona fide* holder for value. *Williams v. Cox*, 97 Tenn. 557, 37 S. W. 282; *Armstrong v. National Bank*, 90 Ky. 436, 14 S. W. 411; *Taft v. Quinsigamond National Bank*, 172 Mass. 363, 52 N. E. 387; *Shawmut National Bank v. Manson*, 168 Mass. 425, 47 N. E. 196; *Wasson v. Lamb*, 120 Ind. 514, 22 N. E. 722; *Grant v. Walsh*, 81 Hun (N. Y.) 449; *Riverside Bank v. Woodhaven Junction Land Co.*, 34 App. Div. (Hun, N. Y.) 859; *Hendley v. Globe Refining Co.*, 106 Mo. App. 20 (1904), and it is immaterial that it can be charged back if not paid; *Standish Trust Co. v. Commercial National Bank*, 166 N. C. 112, 81 S. E. 1074 (1914); *Hobart National Bank v. McMurrough*, 24 Okla. 210, 103 Pac. 601 (1909); *Aebi v. Bank of Evansville*, 124 Wis. 73, 102 N. W. 329,

time of discounting a draft, and at its maturity, the court will hold the consideration good for the entire amount of the draft, and not inquire into the amount drawn upon the strength of it.<sup>2</sup> Paper deposited for collection, but indorsed without restriction, becomes the property of the indorsee as against the maker.<sup>3</sup>

§ 574. **New York.** — In the New York Court of Appeals Judge Andrews said: "The general doctrine, that upon a deposit being made by a customer in a bank, in the ordinary course of business, of money, or drafts or checks *received and credited as money*, the title to the money, or to the drafts or checks, is immediately vested in and becomes the property of the bank, is not open to question. The transaction, in legal effect, is a transfer of the money, or drafts, or checks, as the case may be; by the customer to the bank, upon an implied contract on the part of the latter to repay the amount of the deposit upon the checks of the depositor. The bank acquires title to the money, drafts, or checks, on an implied agreement to pay an equivalent consideration when called upon by the depositor in the usual course of business."<sup>1</sup>

M., who kept an account with the M. and M. Bank of Troy, deposited with that bank a check given for value, drawn by defendant, payable to the order of M., and indorsed by him in blank.<sup>2</sup> Said bank credited the amount of the check in M.'s pass-book, which was returned to him, and on the same day it mailed the check to plaintiff, its correspondent in New York and

109 Am. St. Rep. 925, 68 L. R. A. 964 (1905); *Jefferson Bank v. Merchants' Refrigerating Co.*, 236 Mo. 407, 139 S. W. 545 (1911); *Noble v. Doughten*, 72 Kan. 336, 83 Pac. 1048, 3 L. R. A. (N. S.) 1167, n. (1905).

<sup>2</sup> *First National Bank v. Crawford*, 2 Cin. S. C. Rep. (Ohio) 125.

<sup>3</sup> *Seybold v. Bank*, 5 N. D. 460, 67 N. W. 682; *Noble v. Doughten*, 72 Kan. 336, 83 Pac. 1048, 3 L. R. A. (N. S.) 1167, n. (1905).

<sup>1</sup> § 574. *Craigie v. Hadley*, 99 N. Y. 133; *Metropolitan National Bank v. Loyd*, 25 Hun (N. Y.) 101, 90 N. Y. 530; and see *Brooks v. Bigelow*, 142 Mass. 6, 6 N. E. 766; *Noble v. Doughten*, 72 Kan. 336, 83 Pac. 1048, 3 L. R. A. (N. S.) 1167, n. (1905); *Taft v. Quinsigamond National Bank*, 172 Mass. 363, 52 N. E. 387 (1899); *Plumas County Bank v. Bank of Rideout*, 165 Cal. 126, 131 Pac. 360 (1913), the check was sent for the purpose of opening a new account and was credited as money as intended; *Newmark Grain Co. v. Merchants' National Bank*, 166 Cal. 203, 135 Pac. 958 (1913); *Gonyer v. Williams*, 168 Cal. 452, 143 Pac. 736 (1914).

<sup>2</sup> *Metropolitan National Bank of New York v. Loyd*, 90 N. Y. 534. And see *Scott v. Ocean Bank in City of New York*, 23 N. Y. 289; *Story on Bailments*, § 88; *Keene v. Collier*, 1 Mete. (Ky.) 415; *Brahm v. Adkins*, 77 Ill. 263; *Chapman v. White*, 6 N. Y. 412; *National Bank of Republic v. Millard*, 10 Wall. 152, 19 L. ed. 897; *In re Franklin Bank*, 1 Paige (N. Y.) 254; *Clark v. Merchants' Bank*, 2 N. Y. 380.

its creditor, to be credited on account, and it was so credited. M. stopped payment of the check, and when plaintiff caused payment to be demanded of the drawee it was refused. Notice of presentation and protest was given to defendant, who subsequently paid the amount to M. In an action upon the check, held that upon the deposit the M. and M. bank became owner of the check, and as such could and did give a perfect title to its transferee, and that plaintiff was entitled to recover. It is not disputed that M. held the check as owner; it was his property to do with as he pleased. He had held other checks. Some of these he placed in the Troy bank for collection; others he deposited, and took credit therefor as cash upon his pass-book. As to the first, he could give and revoke his own directions as often as he chose, but as to *the others, when they were by his direction credited to him, the title passed to the bank, and they were not again subject to his control.*<sup>2</sup> This we understand to be the result of the general rule applicable to such transactions.

If a bill or draft be forwarded by its owner for collection, and by order or custom of dealing the party receiving it places the amount to the credit of the owner, and the owner thereupon draws, or is entitled to draw, against the same as cash, this works a transfer of title, so that the owner cannot follow the paper or its proceeds in the hands of a third party receiving it in good faith and due course of business from the agent for collection.<sup>3</sup> “It would be a singular mode of transacting business to give credit for securities and allow the funds thus constituted to be drawn against, and the drawer at the same time to retain the entire legal or equitable interest in the securities of which the fund was composed.”<sup>3</sup> Briggs gave a New York bank (C.) a check on the J. Bank. The C. Bank sent the check to the J., and, under an agreement existing between the two banks, the latter charged the check to the drawer, and credited the amount to the C. Bank. *Held*, that these facts changed the ownership of the check as between the two banks, that the C. Bank must be deemed to have “accepted the responsibility of the drawee upon its credit in the collection account as payment of the check”, and therefore Briggs could recover the amount of the C. Bank.<sup>4</sup>

When a depositor in a bank deposits promissory notes payable to his order and indorsed by him, and receives credit for their

<sup>3</sup> Clark v. Merchants' Bank, 2 N. Y. 380.

<sup>4</sup> Briggs v. Central National Bank, 89 N. Y. 182.



proceeds upon his pass-book he is entitled to recover the amount of the notes even though they are not paid at maturity, when no notice of protest was given him and he did not learn that they had been charged against him until the state superintendent had taken possession of the bank.<sup>5</sup>

When a deposit slip contains the statement that the bank in receiving deposits assumes no responsibility for the failure of any of its collecting agents and that it shall only be liable when the proceeds comes into its possession, the deposit slip must be read into the contract, and the title to the check is not transferred.<sup>6</sup>

§ 575. **United States.** — The opinion<sup>1</sup> of Justice Wallace in the United States Circuit Court is to the same effect: “When a sight bill is deposited with a bank by a customer at the same time with money or currency, and *a credit is given him by the bank for the paper, just as a like credit is given for the rest of the deposit, the act evinces unequivocally the intention of the bank to treat the bill and the money or currency, without discrimination, as a deposit of cash*, and to assume towards the depositor the relation of a debtor, instead of a bailee of the paper. If the customer assents to such action *on the part of the bank by drawing checks against the credit or in any other way*, he manifests with equal clearness his intention to be treated as a depositor of money, and, as such, as a creditor of the bank, instead of a bailor of the paper. Under such circumstances, it should be held that the bank acquires title to the paper just as it would to a deposit of money. The intention of the parties in the particular transaction may be ascertained from the course of their previous dealings. When it appears that it has been the uniform practice between the parties in their past dealings to treat deposits of paper as deposits of cash, their intention to do so in the particular transaction should be inferred, in the absence of new and inconsistent circumstances. It is quite certain that bankers do not invariably credit their customers for sight paper as for cash, but are generally influenced by the financial responsibility of the customer, or the drawee of the paper, or both. . . . Some significance must be attached to a credit entry of the bill upon the books of the bank as cash, and the natural implication would seem to be that the bank, by making such an entry, assumes

<sup>5</sup> *Grossman v. Lafayette Trust Co.*, 146 App. Div. 309 (1911), 130 N. Y. S. 653.

<sup>6</sup> *King v. Bowling Green Tr. Co.*, 145 App. Div. 398 (1911), 129 N. Y. S. 977.

<sup>1</sup> § 575. *St. Louis v. Johnston*, 27 Fed. 243 (1884),

to receive the bill as money. Correlatively, if the depositor understands that the bank proposes to receive the paper as money, and assents, expressly or by acquiescence, it would seem that he consents to part with the title to the paper."

The facts of the case are thus stated by the judge: "For several years prior to the 5th of May, 1884, the plaintiff kept an account with the Marine National Bank of the City of New York, making deposits with and drawing checks upon the bank from time to time. On the fifth day of May, 1884, the plaintiff deposited with the bank a sight draft for \$17,835, dated that day and drawn by the plaintiff upon the treasurer of the Atchison, Topeka, and Santa Fé Railroad Company, of Boston, Mass., which company was indebted to the plaintiff in the amount of the draft. The bank was insolvent at the time, but forwarded the draft to its collecting agent at Boston, and the amount was paid to such agent by the drawee on the seventh day of May, after the bank had failed and closed its doors. *On several occasions during the time the plaintiff kept an account with the bank, the plaintiff deposited similar paper at the same time with money, and the bank credited the plaintiff upon its books, and also upon the pass-book of the plaintiff with the amount of such paper as a cash item.* The plaintiff also entered the amount of such drafts in a memorandum of deposits, kept in its check-book among cash items. The plaintiff has never drawn against the credits given for sight drafts, but never had occasion to do so. There was no express arrangement or understanding between the plaintiff and the bank that such deposits should be treated as cash. When the draft in suit was deposited, it was sent to the bank by a messenger boy, but the plaintiff's pass-book was not sent, having previously been left with the bank for the purpose of being written up. The amount of the draft was credited by the bank on its own books to the plaintiff as a cash item; but it was not entered in the pass-book of the plaintiff until after the failure of the bank, and then without the plaintiff's knowledge. The defendant, who is the receiver of the bank, had notice of the plaintiff's rights before the proceeds of the draft were paid over to him by the collecting agent at Boston."

Here, as in the previous cases, the question was, Had the title passed as against the depositor? If the title was still in him when the draft was paid, then he could recover from the receiver, since the proceeds were not mingled with the assets before the

receiver took possession of them, but were capable of identification and tracing to his possession.

"A deposit being made by a depositor in a bank, in the ordinary course of business, of money, or drafts or checks received and credited as money, the title to the money or drafts or checks is immediately vested in and becomes the property of the bank."<sup>2</sup>

§ 576. If A. indorses to B. certain bills "for collection", and, based on the possession of such bills, being accepted and soon to mature, B. allows A. to realize the proceeds of the bills before their payment, by drafts upon B. in anticipation of the collection, there seems every reason to allow B. to hold the bills against A. until the advances are repaid. The case is not distinguished from any other advance on collateral security, and B. should have a lien upon the paper.<sup>1</sup>

§ 577. **Indorsement "For Deposit."** — When a bank receives from a customer a check on another bank for the special purpose of collection, the title does not pass by the special indorsement for that purpose, nor does the receiving bank owe the amount until the check is collected. But where the customer has a deposit account with the bankers, on which he is accustomed to deposit checks payable to himself, which are entered on his pass-book, and to draw against such deposits, an indorsement of the words "for deposit" on a check so deposited "is, in the absence of a different understanding, presumption of more than a mere agency or authority to collect"; it is a request and direction to deposit the sum to the credit of the customer, and gives to the bankers authority not only to collect, but to use the check in such manner as, in their judgment and discretion, having reference to the condition and necessities of their business, may make it most available in their possession, and they may have it certified by the bank on which it is drawn.<sup>1</sup>

<sup>2</sup> *National Citizens' Bank v. Howard*, 3 How. Pr. N. S. (N. Y.) 512; *Auto etc. Mfg. Co. v. Merchants' National Bank*, 116 Md. 79, 81 Atl. 294 (1911); *Burton v. United States*, 196 U. S. 283, 49 L. ed. 482, 25 Sup. Ct. 243 (1906).

<sup>1</sup> § 576. *Perry on Trusts*, §§ 161, 243; *Michigan State Bank v. Gardiner*, 15 Gray (Mass.) 362; *Ullman v. Barnard*, 7 Gray (Mass.) 554; *Story's Equity*, § 1265; *Patton v. Beecher*, 62 Ala. 579; *Tankersley v. Graham*, 8 Ala. 247; *Newlin v. McAfee*, 64 Ala. 357; *Powell v. Jones*, 72 Ala. 392; *Ellis v. Amason*, 2 Dev. Eq. (N. C.) 273; *Legard v. Hodges*, 1 Vesey Jr. 477.

<sup>1</sup> § 577. *National Commercial Bank v. Miller*, 77 Ala. 168; *Security Bank v. North Western Fuel Co.*, 58 Minn. 141, 59 N. W. 987; *Auto etc.*

§ 578. When a note or check is received for collection and credited, the transaction does not preclude the bank from cancelling the credit if the note or check is dishonored<sup>1</sup> or proves to be worthless.

§ 579. When a sale of goods is made, and the parties intend to pass title for cash, and the price is entered as a credit in the pass-book of the seller and on the bank-books of the buyer, such entry is equivalent to payment and subsequent deposit.<sup>1</sup>

§ 580. It is said in a note to Section 228 of Story on Agency, that "if the bills were entered as cash, with the knowledge of the customer, and he drew or was entitled to draw upon the banker, as having that credit in cash, he would thereby be precluded from recurring to the bills specifically. Where the owner of a bill sends it to his correspondent to be collected, with directions to place it to his credit, and at the same time draws at sight against the fund, the title to the bill passes, so that the proceeds cannot be followed into the hands of third persons receiving them in good faith."

§ 581. **Massachusetts.** — "If a check made in this Commonwealth and payable to a resident of another State is deposited by him in a bank there, where he has a general account, under an agreement that all checks drawn on banks in other places shall be passed to his credit on the day of deposit, but, if they are returned unpaid they shall be charged to his account, and by the law of that State the bank is not his agent in collecting the check, but becomes the owner of it, with the right of charging it back to his account if it is not paid by the bank on which it is drawn, the receiver of the bank, which suspends business on the day of such deposit, may maintain an action for the amount of the check against the maker, who cannot avail himself, in defence, of the fact

*Mfg. Co. v. Merchants' National Bank*, 116 Md. 179, 81 Atl. 294 (1911); *Miller v. Norton*, 114 Va. 609, 77 S. E. 452 (1913); *Cronheim v. Postal Telegraph-Cable Co.*, 10 Ga. App. 716, 74 S. E. 78 (1910).

<sup>1</sup> § 578. *Trinidad National Bank v. Denver National Bank*, 4 Dill. 290; *Trust & Savings Bank v. Manufacturing Company*, 150 Ill. 336, 37 N. E. 227; *Rapp v. National Bank*, 136 Pa. St. 426, 20 Atl. 508; *Pulmas County Bank v. Bank of Rideout*, 165 Cal. 126, 131 Pac. 360 (1913); *Bank of Commerce v. Ingram*, 33 Okla. 46, 124 Pac. 64 (1912); *Bank of Big Cabin v. English*, 27 Okla. 334, 111 Pac. 386 (1910); *Henley v. Globe Refining Co.*, 106 Mo. App. 20, 79 S. W. 1163 (1904). See *Landa v. Traders' Bank*, 118 Mo. App. 356, 94 S. W. 770 (1906), holding that if in payment of the check another check is received which is subsequently dishonored there can be no charging back of the credit given.

<sup>1</sup> § 579. *Flanders v. Maynard*, 58 Ga. 56 (1877).

that, upon such suspension, the payee of the check stopped payment of the same.”<sup>1</sup>

§ 582. **New Jersey.** — “A check indorsed in blank by the payee, and placed to his credit in the bank, becomes the bank’s legal property, and can be transferred to a *bona fide* creditor.”<sup>1</sup> In the first case cited two checks were deposited in the C. Bank, and by it sent to the First National with nothing to show that they were not really and fully the property of the C. The National applied the checks upon the existing indebtedness of the C. to it. On failure of the C. it was held that the National was a holder for value, and the depositor, not having indorsed “for collection”, as he could so easily have done, must bear the consequences of his own carelessness.

§ 582 A. **Maryland.** — Where a check is deposited indorsed “for deposit to the credit of” the depositor, and is so credited to him as cash, and later transferred as cash to a second bank which pays the first bank, the depositor cannot reclaim it or its proceeds on failure of the first bank. The title passed and is in the second bank, and the testimony of the depositor that he regarded all checks deposited by him as deposited for collection, is incompetent.<sup>1</sup>

§ 582 B. **Minnesota.** — The general rule is that paper received with an unrestricted indorsement, and credited as money, becomes at once the property of the bank. But the real question is as to the agreement of the parties.<sup>1</sup>

§ 582 C. **Kansas.** — When a check is indorsed by the payee and deposited in the bank where he is accustomed to do business and there are no reservations or limitations and no other agreement or undertaking than that which the law implies, the check becomes the property of the indorsee.<sup>1</sup> And if the bank indorses it to the order of its correspondent and forwards it with a deposit slip attached for credit as a cash deposit the title vests in the correspondent which accepts it and undertakes to collect it.<sup>1</sup>

<sup>1</sup> § 581. *Brooks v. Bigelow*, 142 Mass. 6, 6 N. E. 766 (1886).

<sup>1</sup> § 582. *Hoffman v. First National Bank of Jersey City*, 46 N. J. L. 604 (1884); *Dirnfeld v. Fourteenth St. Sav. Bank*, 37 App. Cas. (D. C.) 11 (1911); *Noble v. Doughten*, 72 Kans. 336, 83 Pac. 1048, 3 L. R. A. (n. s.) 1167, n. (1905); *Auto etc. Mfg. Co. v. Merchants’ National Bank*, 116 Md. 179, 81 Atl. 294 (1911).

<sup>1</sup> § 582 A. *Ditch v. Western National Bank*, 79 Md. 192, 29 Atl. 72, 138.

<sup>1</sup> § 582 B. *In re State Bank*, 56 Minn. 119, 57 N. W. 336.

<sup>1</sup> § 582 C. *Noble v. Doughten*, 72 Kan. 336, 83 Pac. 1048, 3 L. R. A. (n. s.) 1167, n. (1905). And the right to charge the amount of the check

§ 583. **When Title to Paper deposited does not pass.** — If a bank does not wish to assume the relation of debtor as to paper deposited, it can easily indicate such intent by crediting it as paper, and not as cash.<sup>1</sup>

(a) So if the depositor wishes to retain the ownership he may do so by indorsing “for collection.”<sup>2</sup>

(b) When there is no usage or course of dealing between the parties to decide the matter, and a check is received without instructions, the bank may elect to receive it for collection or as cash, and the depositor is the owner until the bank makes its election by crediting as cash.<sup>3</sup>

### *Effect of Indorsing Paper to the Bank*

(c) Where the customer deposits in the bank commercial paper for collection, at the same time indorsing it over to the bank, the parties understanding that it is only intended by the indorsement to put the paper in such shape that the bank can collect upon it, the title in the paper does not thereby pass to the bank;<sup>3a</sup> nor does the bank owe the amount to the customer until such time as the collection is actually consummated.<sup>3a</sup> Neither is this strict right of the bank curtailed or altered simply because a practice has been allowed to prevail, by which it has allowed the depositor to draw against deposits of paper for collection before the collection has been actually made. This is a mere gratuitous privilege allowed by the bank, which does not grow into a binding

to the depositor's account if it is dishonored is not inconsistent with ownership. *Ibid.*

<sup>1</sup> § 583. *Thompson v. Giles*, 2 Barn. & Cr. 422; *Rowton's Case*, 1 Rose 15, and *Sergeant's Case*, 1 Rose 153; *Bailie v. Augusta Savings Bank*, 95 Ga. 280, 21 S. E. 717.

<sup>2</sup> *Sweeny v. Easter*, 1 Wall. 166, 17 L. ed. 681; *Hoffman v. First National Bank*, 46 N. J. L. 604; *Cecil Bank v. Farmers' Bank*, 22 Md. 148; *Griffin v. Chase*, 36 Neb. 328, 54 N. W. 572; *Packing Company v. Davis*, 118 N. C. 555, 24 S. E. 365.

<sup>3</sup> *Scott v. Ocean Bank*, 23 N. Y. 289.

<sup>3a</sup> When paper is sent to a bank indorsed “we enclose for collection and credit” the bank does not obtain title before the money is actually collected even though the depositor owes the bank at the time of the deposit of the paper. *Bank of America v. Waydell*, 103 App. Div. 25 (1905), 92 N. Y. S. 666.

<sup>3a</sup> *Packing Company v. Davis*, 118 N. C. 554, 24 S. E. 365; *Third National Bank v. Exum*, 163 N. C. 199, 79 S. E. 498 (1913). See *Alpine Cotton Mills v. Weil*, 129 N. C. 452, 40 S. E. 218 (1901); *Latham v. Spragins*, 162 N. C. 404, 78 S. E. 282 (1913).

legal usage. Thus it is very common for depositors to deposit checks with their banks, and to draw against them on the same day checks of their own, which may be presented for payment before the bank has had an opportunity to collect upon the deposited checks. In such cases banks are frequently wont to honor such checks of their customers upon the confidence that the deposited checks will be duly paid. But this habit of the banks is a pure favor, and if there be no distinct understanding to change the natural effect of such dealing its long continuance gives no real right whatsoever to the depositor to demand its continuance or its practice in any individual case wherein the bank may, for any arbitrary reason, see fit to withhold that favor.<sup>3</sup>

*England. Bills not Due Credited*

(d) In England, a decision, given by Lord Ellenborough,<sup>4</sup> went much further even than this. Bills not yet due were sent to a country banker to collect; according to the custom of country bankers, these were actually entered in the banker's own books to the depositor's credit, with proper discount, and he was thereafter entitled to draw against this credit before the actual collection. Upon the subsequent failure of the banker, before the collection, it was held that the title in the bills had not passed to him, and that the depositor should recover them specifically, or their amount if the bankrupt's assignees had already made the collection.

(e) But Lord Eldon held that a depositor could not recover specifically bills entered as cash, to his knowledge, with the privilege of drawing against them.<sup>5</sup>

*Garnishee*

(f) A judgment debtor presented a village order to a bank and asked for a loan thereon. He indorsed it as directed by the cashier, and placed it on the bank counter inside of the screen. While the cashier was counting out the money, and before he had given any money to the debtor, an officer having garnishee process founded on the judgment said to the cashier, "Stop payment, I have some papers." Before the cashier received the papers the

<sup>4</sup> *Giles v. Perkins*, 9 East 12.

<sup>5</sup> *Ex parte Sargeant*, 1 Rose 153; *Ex parte Thompson*, 1 Mont. & MacA. 102.

debtor took the order from the counter and left with it. *Held*, that title to the order had not passed to the bank so as to render it liable as garnishee.<sup>6</sup>

When a pension warrant is given to the bank for collection it cannot be garnisheed until the bank actually receives the money therefor even though it gave credit to its customer upon the receipt of the warrant.<sup>7</sup>

§ 584. **In Alabama**,<sup>1</sup> it is held that, in absence of any agreement to the contrary, "when a check is deposited it is taken generally for collection by the bank as the agent of the depositor, and the bank does not owe the amount until its collection is accomplished. It may be, that, if it is passed to the credit of the depositor and mingled with the general funds of the bank, it is *prima facie* a payment on deposit; *but the bank may permit, as a matter of favor and convenience, checks to be drawn against it before payment, the depositor in the event of non-payment being responsible for the sums drawn*, — not by reason of his indorsement, the check not having ceased to be his property, but for money paid."

§ 585. **In Louisiana**,<sup>1</sup> in one of the lower courts, a similar decision is found: "Checks, like drafts, bills, or notes, so deposited with a bank, are placed for collection, and not sold, exchanged, or otherwise made the subject of a contract calculated to transfer title. It is hard to imagine any advantage which could exist, calculated to induce a bank to assume ownership and responsibility for such paper. *The fact that owing to the short course such paper has to run, these institutions usually permit their customers to draw against the amount of checks deposited does not of itself alter the relations between the parties. The credit is only conditional, and may be cancelled, and the check returned*, should the latter be dishonored. The depositor remains owner of the paper, and the bank merely agent."

§ 586. Checks deposited and credited as cash do not become the property of the bank, so that it takes the risk upon itself even though the depositor has been allowed to check against the

<sup>6</sup> Gleason v. Bank, 89 Wis. 534, 62 N. W. 519.

<sup>7</sup> Jones v. Coventry, (1909) 2 K. B. 1029.

<sup>1</sup> § 584. National Commercial Bank v. Miller, 77 Ala. 173.

<sup>1</sup> § 585. Louisiana Ice Co. v. State National Bank, 1 McGloin (La.) 185.

In Virginia the intention of the parties governs the question. Fayette National Bank v. Summers, 105 Va. 689, 54 S. E. 468, 7 L. R. A. (N. S.) 694, n. (1906); Miller v. Norton, 114 Va. 609, 77 S. E. 452 (1913).



deposit before the paper is collected,<sup>1</sup> and the depositor can recover the check or other paper, if it is still in the possession of the depositor.

When a depositor deposits a check *on another bank*, without any special contract, the property remains in him, and the bank is his agent until it has notice that the correspondent bank has received the money and credited it.<sup>1a</sup> If the deposit is made and credited to cover an overdraft, or is drawn upon, the bank can hold the paper until the account is squared, but the property is in the customer. It is said that indorsement of the check to the bank, and credit on the books of the bank and on the pass-book, are evidence of a contract by which the bank shall become owner of the paper; but (1) banks always claim and *exercise the right of charging to the depositor all such checks returned unpaid, which is not consistent with the theory of an understanding that title passes absolutely*.<sup>1b</sup>

<sup>1</sup> § 586. *Balbach v. Frelinghuysen*, 15 Fed. 675.

<sup>1a</sup> If the correspondent receives the money and becomes insolvent the forwarding bank is not liable to the depositor. *Falls City Woolen Works v. Louisville National Banking Co.*, 145 Ky. 64, 140 S. W. 66 (1911).

In the absence of a special contract the property in checks or drafts on depositaries other than the one in which the deposit is made by the owner of the checks and draft remain in such owner until collection is made, credit entered and notice given of such credit to the depositary receiving such checks or drafts from the owner. Under this rule it becomes a question of fact rather than of law. *Goshorn v. Murray*, 197 Fed. 457 (1912). But see *Goshorn v. Murray*, 210 Fed. 880 (1914) holding on the facts that the relation is that of debtor and creditor.

<sup>1b</sup> See *Alpine Cotton Mills v. Weil*, 129 N. C. 452, 40 S. E. 218 (1901); *Latham v. Spragins*, 162 N. C. 404, 78 S. E. 282 (1913); *Third National Bank v. Exum*, 163 N. C. 199, 78 S. E. 498 (1913); *Fanset v. Garden City State Bank*, 24 S. D. 248, 123 N. W. 686 (1909); *Winchester Milling Co. v. Bank of Winchester*, 120 Tenn. 225, 111 S. W. 248, 18 L. R. A. (N. S.) 441, n. (1907). And the fund collected is subject to garnishment for the debts of the depositor to the extent of his interest in the fund when the garnishment notice is served. *Barton Seed etc. Co. v. Mercantile National Bank*, 128 Tenn. 320, 160 S. W. 848 (1913). See also *Washington Brick etc. Co. v. Traders' National Bank*, 46 Wash. 23, 89 Pac. 157, 123 Am. St. Rep. 912 (1907).

When there is an agreement that the credit which has been credited may be charged back if the check cannot be collected the bank is not liable to a depositor because of the credit given. *Security Savings etc. Co. v. King*, 69 Or. 228, 138 Pac. 465 (1914).

When a bank gives a county treasurer credit for a fraudulent county warrant payable to a third person whose name was indorsed by the treasurer it may, upon discovering the fraudulent character of the warrant, charge such credit off its books by debiting the treasurer, as treasurer, with the amount of such warrant, and such transaction does not liquidate

(2) The practice of allowing depositors to check against such paper is reckoned by the ablest text-writers as a mere gratuitous privilege<sup>1</sup> (referring to Morse, 2d ed., p. 27). This decision is approved in New Jersey.<sup>2</sup>

§ 587. If, however, the check is not *still in the possession of the depositary bank*, but has been forwarded by it and credited by its correspondent, the depositor is not entitled to preference.<sup>1</sup> In Illinois, the A. Bank received from a depositor a check on the B. Bank for collection, and credited its depositor with the amount at the time of receiving the check. The check was returned from the B. dishonored. *Held*, that the A. might cancel the credit given.<sup>2</sup>

This matter of crediting paper does not seem capable of settlement merely by showing a usage or course of dealing to credit as cash and allow the depositor to draw at once. Such usage is not a usage to take the risks on the paper, and is consistent with the subsequent cancelling of the credit on dishonor of the paper; to establish by usage the claim that the bank must bear the risk, it must be shown that in a long series of instances in which the question arose the bank has borne the loss by dishonor of paper credited as cash. Moreover, the existing customs in this department of banking seem more like a series of courtesies than such stuff as usages are made of. If the bank is wont at once, on receiving such a check of a third party drawn on another bank, to give the customer credit for the amount, and to allow him instantly to draw against his credit or balance thereby created, then it is possible that this habit may exhibit the traits of a legal usage, and may therefore suffice to create an implied contract between the parties, which will bind the bank to cash the customer's checks drawn against a deposit of such other checks at any time before they have been presented for collection. But though there is no legal objection to the establishment of such a usage as this, there are strong practical obstacles. A bank may be willing in ninety-nine cases out of a hundred to risk the goodness of the check deposited.

the shortage of the treasurer or exonerate the surety on his official bond. *Dickinson v. White*, 52 N. D. 523, 143 N. W. 754, 49 L. R. A. (N. S.) 362 (1913).

<sup>2</sup> *Hoffman v. First National Bank*, 46 N. J. L. 607; *Morris-Miller Co. v. Von Pressentin*, 63 Wash. 74, 114 Pac. 912 (1911); *Belsheim v. First National Bank*, 77 Wash. 552, 137 Pac. 1055 (1914).

<sup>1</sup> § 587. *Terhune v. Bank of Bergen Co.*, 34 N. J. Eq. 367.

<sup>2</sup> *Decatur National Bank v. Murphy*, 9 Ill. App. 112 (188).

But its mere willingness in each one of these cases to waive the full exercise of its strict right ought not alone, *per se*, to operate to deprive it of the right in a case wherein it should desire to exercise it. A habit to do a favor to a customer when it seems safe, is not a legal usage creating an obligation to do a like act when it seems unsafe. Strictly the custom, whether a legal usage or a mere habit, is not always and unconditionally to regard deposited checks as money before they are actually collected, but to do so at the bank's discretion. That the discretion happens to operate favorably for the customer in any number of consecutive cases, or for any length of time, ought to afford no cause for expecting or insisting that it shall continue to operate so in any other especial case. Whence it follows, that something in the nature of a tacit understanding, operating to give the color of agreement to the naked habit, must be shown in order to establish the legal usage; which, however, when established, will be intrinsically valid.

(a) When the depositor of paper for collection knows of the failing condition of the drawee, and does not inform the depositary of the fact, the latter is not bound by a crediting of the paper.<sup>3</sup>

§ 589. **Insolvency of Depositary as a Ground for Recovery of Deposit.** — A depositor cannot recover a deposit in preference to the general creditors, on the ground that it was received while the bank was insolvent, if the bank was ignorant of its condition.<sup>1</sup> And even though knowing its insolvency, there is no reason to require the officers to disclose the state of affairs to the depositor; they may have reasonable hopes of recovery,<sup>2</sup> and a deposit actually received and mingled with the bank's funds passes title,<sup>3</sup> and the depositor takes only as a general creditor,<sup>3a</sup> unless of course the deposit was paper that, under the law governing the parties, did not pass to the bank,<sup>3b</sup> insolvent or not,<sup>4</sup> or unless the deposit is received

<sup>3</sup> *Freeholders of Middlesex v. State Bank*, 32 N. J. Eq. 467 (1880).

<sup>1</sup> § 589. *Metropolitan Bank v. Loyd*, 25 Hun (N. Y.) 101; *In re Bank of Madison*, 5 Biss. 515; *Cronheim v. Postal Telegraph-Cable Co.*, 10 Ga. App. 716, 74 S. E. 78 (1912); *Goshorn v. Murray*, 197 Fed. 407 (1912); *Brennan v. Tillinghast*, 201 Fed. 609 (1913).

<sup>2</sup> *St. Louis v. Johnston*, 27 Fed. 543.

<sup>3</sup> *Illinois Trust & Savings Bank Case*, 21 Blatchf. 275.

<sup>3a</sup> In Iowa a depositor in a savings bank is entitled to a preference over general creditors. *State v. Corning State Savings Bank*, 136 Iowa 79, 113 N. W. 500 (1907).

<sup>3b</sup> One who makes a special deposit has no preference. *Woodhouse v. Crandall*, 197 Ill. 104, 64 N. E. 292, 58 L. R. A. 385 (1902).

<sup>4</sup> *Balbach v. Frelinghuysen*, 15 Fed. 675.

under circumstances amounting to a fraud upon the depositor;<sup>4a</sup> that is always sufficient to open the door to rescission of a contract, and the depositor can retain against any but a *bona fide* holder.<sup>5</sup> If the deposit has been kept separate, and never actually and fully received as a deposit, the depositor may claim it, though, so far as he knew, it had been taken just as usual. These points will now be more fully examined.

(a) When money is paid in by a customer after banking hours, and is put in a place by itself, and not entered in the regular books of the bank, and the bank fails and does not open on the next day, the necessity of failing having been already agreed upon by all the partners, the customer may reclaim his deposit, and hold it as against the assignee of the bankrupt.<sup>6</sup> Though in another case, wherein it was shown that the bankers were in the habit of receiving and the customer was in the habit of making deposits after banking hours, and that such deposits were always regarded and treated by both parties as if regularly made during banking hours, and the bankers had not determined upon the necessity of failing when the deposit was made, a contrary decision was reached.<sup>7</sup> An insolvent bank contemplating suspension acquires no title to a check deposited by one to whom its condition is unknown.<sup>8</sup>

(b) A national bank<sup>9</sup> known to its officers to be insolvent received a draft for *collections and remittance*; it obtained the money and mingled it with its own funds before any proceedings were instituted for putting it into liquidation. The court held that it was fraudulent in the bank thus to mingle the proceeds, but having done so, and it being impossible for the plaintiff to identify his money, he could not be preferred to the other creditors of the bank.<sup>9a</sup>

<sup>4a</sup> When a deposit is made one half hour before the bank closes its doors the depositor is entitled to a preference. *Willoughby v. Weinberger*, 15 Okla. 222, 79 Pac. 777 (1905); or two hours before insolvency. *Cherry v. Territory*, 17 Okla. 221, 89 Pac. 192, 8 L. R. A. (N. S.) 1254.

<sup>5</sup> *Craigie v. Hadley*, 99 N. Y. 131; *Quin v. Earle*, 95 Fed. 728; *Orme v. Baker*, 74 Ohio St. 337, 78 N. E. 439 (1906).

<sup>6</sup> *Threlfal v. Giles*, cited 2 M. & Rob. 492; *Sadler v. Belcher*, *id.*, 489.

<sup>7</sup> *Ex parte Clutton*, 1 Fonb. 167.

<sup>8</sup> *Fisse v. Dietrick*, 3 Mo. App. 584 (Appendix, 1877).

<sup>9</sup> *Illinois Trust & Savings Bank of Chicago Case*, 21 Blatchf. 275.

<sup>9a</sup> But see *American Can Co. v. Williams*, 176 Fed. 816 (1908); *id.*, 178 Fed. 420 (1910), holding that the funds of a draft collected by an insolvent bank and intermingled may be recovered if they can be traced into the assets of the bank or added as gain to its general assets. See also *Cherry*

But when checks were deposited in a bank which had been insolvent for some time, a condition of which the officers must have known, such checks, if not collected at the time of the bank's suspension, are not the property of the bank, and the depositor may recover them,<sup>9a</sup> unless they have passed into the hands of innocent parties.<sup>9b</sup>

A banker who hoped to recover from his insolvency received a deposit from D., who was ignorant of the condition of the bank, marked with D.'s name, and kept it separate, with intent to return it to D. in case he was compelled to assign for the benefit of his creditors. It was entered in the depositor's book and in a memorandum cash-book, but in no other. The banker did assign, and, giving the said deposit to the assignee, requested him to give it to D., which was held proper by the court, and it was done.<sup>10</sup> But where money has once been actually and fully received on deposit, the bank cannot secure a favorite depositor from loss by marking a package of money with his name before assignment.<sup>11</sup>

§ 590. **Money not belonging to the Depositor.** — When an agent or trustee deposits money of his principal or *cestui*, in his own name, in a bank to which he is indebted, and the bank in ignorance of the true ownership applied the money upon the debt, the owner can recover such money if it can be identified.<sup>1</sup> The Michigan case was error for instructions contrary to the prin-

*v. Territory*, 17 Okla. 221, 89 Pac. 192 (1906); *id.*, 17 Okla. 213, 89 Pac. 190 (1907); *Peters Shoe Co. v. Murray*, 31 Tex. Civ. App. 259, 71 S. W. 977 (1903).

<sup>9a</sup> *Gerald Point Storage Co. v. Roy*, 93 Fed. 575.

He may recover the proceeds from a receiver who collects them. *Orme v. Baker*, 74 Ohio St. 337, 78 N. E. 439, 113 Am. St. Rep. 962 (1906); and he may recover from a receiver the proceeds of the sale of collateral to a note so far as they can be traced into his hands. *Brennan v. Tillinghast*, 201 Fed. 609 (1913).

<sup>9b</sup> *Willoughby v. Weinberger*, 15 Okla. 222, 79 Pac. 777 (1905).

<sup>10</sup> *Chaffee v. Fort*, 2 Lans. (N. Y.) 81. See *Atkin v. Barwick*, 1 Strange 165.

<sup>11</sup> *Coots v. McConnell*, 39 Mich. 742 (1878).

<sup>1</sup> § 590. *Burnett v. First National Bank*, 38 Mich. 630; *Cook v. Tullis*, 18 Wall. 332, 21 L. ed. 933; *Cady v. So. Omaha National Bank*, 46 Neb. 756, 65 N. W. 906; *Robards v. Hamrick*, 39 Ind. App. 134, 79 N. E. 386 (1906); *Shawnee National Bank v. Wootten*, 24 Okla. 425, 103 Pac. 714 (1909); *Patek v. Patek*, 166 Mich. 446, 131 N. W. 1101, 35 L. R. A. (n. s.) 461, n. (1911), deposit by a wife; *McLennan v. Farmers' Savings Bank*, 131 Iowa 696, 109 N. W. 291, 117 Am. St. Rep. 439 (1906).

ciple that a *cestui* can follow the trust property so long as he can identify it.

(a) The C. Bank's teller, T., was a defaulter, and to make his cash full for a count he got a friend, W., to draw a check on C. for \$25,000. T. marked it good, and the D. Bank gave W. the cash, which was taken to the C. Bank and put in the form of a package with the rest of the money to be counted, T. intending to return the money after the count and redeem the check; but some suspicion being aroused, he committed suicide, and the money was thus left in possession of the C. Bank. Both banks claimed it, and the court said that the C. Bank could not hold the bills as negotiable securities transferred to it for a good consideration in the usual course of business. Clearly the transaction was not in the usual course of business, and there was not even any intent to transfer the money to the C. Bank. The money could be identified, and in equity and good conscience it belonged to the D. Bank.<sup>2</sup>

(b) In the Van Alen case,<sup>3</sup> P. gave A. certain bonds to sell and deposit the proceeds in P.'s name. A. sold the bonds, substituted other money for what he received from the sale, and deposited the substitute with more in his own name, yet P. recovered from the bank *which still owed the amount*. The judge said that, if A. had spent the money, so that it was dissipated and could not be traced at all, the *cestui* could not have followed it;<sup>3a</sup> but here it was clear from the evidence that A. made a substitution. "If my agent collects \$100 rent for me, puts it in one pocket, takes from another pocket other \$100, deposits it, and notifies me, are my rights gone by the mere change of money? I think not."

If the trust money or its substitute can be traced into the bank, the owner can claim it, if it is still there. It has been transformed into the shape of a debt due the trustee, and is practically in the same position as substituted property actually in the hands of the trustee.<sup>3b</sup>

<sup>2</sup> Atlantic Bank v. Merchants' Bank, 10 Gray (Mass.) 532.

<sup>3</sup> Van Alen v. American National Bank, 52 N. Y. 1.

<sup>3a</sup> When a bank receiving a note for collection and remittance, collects the money and uses it in its own business the sender of the note has no right to take from a fund which was not on hand when the bank failed but which has been realized from a sale an amount equal to that which the bank collected and used. Ober v. Cochran, 118 Ga. 396, 45 S. E. 382, 98 Am. St. Rep. 118 (1903).

<sup>3b</sup> Rothenberg v. Vierath, 87 Md. 634, 40 Atl. 655; Lincoln v. Morrison, 64 Neb. 822, 90 N. W. 905, 57 L. R. A. 885 (1902).

(c) In an English case <sup>4</sup> the Master of the Rolls said that the real owner could not recover, because the money in bank had no " earmark", could not be identified. But on appeal, Chancery said that the *debt* was the property, and if it could be identified as a substitute of the original, then so long as it remained due it could be claimed by the *cestui*.

And in Hallett's case the court said that if money held by a person in a fiduciary capacity, although not as a trustee, has been paid by him to his account at his bankers, the person for whom he held the money may follow it, and has a charge of the *balance* in the banker's hands; and the rule in Clayton's case does not apply, but the trustee or agent is deemed to draw his own money first.<sup>5</sup> A like view has been taken by the New York and other courts.<sup>5a</sup>

(d) And in New York, it has also been held that trust money deposited with other moneys belonging to the trustee and to third persons may still be claimed, and that its identity is not so far destroyed as to make the *cestui* only one of the general creditors in case of the trustee's insolvency, and the rule in Clayton's case does not apply.<sup>6</sup> The general rule is, that a *cestui* can follow the

<sup>4</sup> Pennell v. Deffell, 4 De Gex, M. & G. 372.

<sup>5</sup> Knatchbull v. Hallett, 13 Ch. D. 696.

<sup>5a</sup> Hauptmann v. First National Bank, 83 Hun (N. Y.) 78; Importers and Traders' National Bank v. Peters, 123 N. Y. 272, 25 N. E. 319; Roca v. Bryne et als., 145 N. Y. 182, 39 N. E. 812. See Oswego Milling Co. v. Skillern, 73 Ark. 324, 84 S. W. 475 (1904); Hill v. Miles, 83 Ark. 467, 104 S. W. 198 (1907); Covey v. Cannon, 104 Ark. 550, 149 S. W. 514 (1912) holding that if at any time the amount drawn leaves a balance less than the amount of the trust funds they must be regarded as dissipated to that extent even if there are subsequent deposits; Woodhouse v. Crandall, 197 Ill. 104, 64 N. E. 292, 58 L. R. A. 385 (1902); Patek v. Patek, 166 Mich. 446, 131 N. W. 1101 (1911) holding that when one shows that ever since one's money has been deposited without one's knowledge or consent, the general funds of the bank have exceeded the amount of deposit one establishes the presumption that one's money is still in the bank; Fogg v. Bank of Friar's Point, 80 Miss. 750, 32 So. 285 (1902); Yellowstone County v. First Trust & Savings Bank, 46 Mont. 439, 128 Pac. 596 (1912); Widman v. Kellogg, 22 N. D. 396, 133 N. W. 1020, 39 L. R. A. (n. s.) 563 (1912); Smith v. Fuller, 86 Ohio St. 57, 99 N. E. 214, 1913D Ann. Cas. 387, n.; Plano Mfg. Co. v. Auld, 14 S. D. 512, 86 N. W. 21, 86 Am. St. Rep. 769, n. (1901); Peters Shoe Store v. Dougherty, 31 Tex. Civ. App. 259, 71 S. W. 977 (1903); Boyle v. Northwestern National Bank, 125 Wis. 498, 103 N. W. 1123, 110 Am. St. Rep. 844, 1 L. R. A. (n. s.) 1110, n. (1905); Emigh v. Earling, 134 Wis. 565, 115 N. W. 128, 27 L. R. A. (n. s.) 243, n. (1908); Holden v. Western German Bank, 136 Fed. 90 (1905); In re City Bank, 186 Fed. 413 (1910); Brennan v. Tillinghast, 201 Fed. 609 (1913).

<sup>6</sup> Rabel v. Griffin, 12 Daly (N. Y.) 241.

trust property as far as it can be traced,<sup>7</sup> but not when mingled with other property, so as to be undistinguishable.<sup>8</sup>

But in Iowa money paid to the owner of a bank, as agent for the sale of P.'s land, and deposited by said owner in the bank, is impressed with a trust, and P. is entitled to a preference over general creditors.<sup>8a</sup>

And in Kansas a treasurer of a board of education deposited, without authority, money of the board, in a bank of which he was treasurer. The owner of the bank had knowledge of the character of the funds. *Held*, that the funds were held as a trust fund although they had become indistinguishably mingled with the general assets of the bank.<sup>8b</sup>

In the same state it is held that a bank which receives from an agent for deposit in his own name the money of his principal without notice of the agency is protected in applying it to a past due debt of the depositor.<sup>8c</sup>

(e) If a deposit of trust property exists in such shape that the trustee or his representative can claim it, *i.e.*, if it is in the name of the trustee himself, and unincumbered as against him, the *cestui* can elect to claim the deposit as his own, or pursue his remedy against the trustee.<sup>9</sup> This seems to us the correct principle, that if the bank has a lien on funds deposited in the name of A., or has taken negotiable paper as security, or in payment of a debt, or in any way has a claim upon the deposit as against the depositor, and has no reason to suppose he is not the true owner at the time of deposit, the bank will be protected,<sup>9a</sup> and the true owner can claim only subject to the demand of the bank; and further, that

<sup>7</sup> *United States v. State Bank*, 96 U. S. 30, 24 L. ed. 647.

<sup>8</sup> *Case v. Beauregard*, 1 Woods 126. See *Young v. Teutonia Bank etc. Co.*, 134 La. 879, 64 So. 806 (1914).

<sup>8a</sup> *Brooke v. King*, 104 Iowa 713, 74 N. W. 683.

<sup>8b</sup> *Myers v. Board of Education*, 51 Kan. 87, 32 Pac. 658; *Smith v. Fuller*, 86 Ohio St. 57, 99 N. E. 214, 1913D Ann. Cas. 387, n.; *London v. Morrison*, 64 Neb. 822, 90 N. W. 905, 57 L. R. A. 885 (1902).

<sup>8c</sup> *Kimmell v. Bean*, 68 Kan. 598, 75 Pac. 1118, 104 Am. St. Rep. 415, 64 L. R. A. 785 (1904); *Tough v. Citizens' State Bank*, 89 Kan. 583, 132 Pac. 174 (1913); *Martin v. Kansas National Bank*, 66 Kan. 655, 72 Pac. 218 (1903).

<sup>9</sup> *School Dist. v. First National Bank*, 102 Mass. 174; *Bartlett v. Hamilton*, 46 Me. 435; *Utica Ins. Co. v. Lynch*, 11 Paige (N. Y.) 520; *McAllister v. Commonwealth*, 30 Pa. St. 536; *Waltner v. Dolan*, 26 Am. Law Reg. n. s. 25 (Ind.).

<sup>9a</sup> See *First National Bank v. City National Bank*, 102 Mo. App. 357, 76 S. W. 489 (1903).



where a trust deposit is actually mingled with other funds, so that the original property cannot be identified, the *cestui* has no better equity than the other creditors of the trustee in case of his failure. And this is the view taken by some later cases.<sup>10</sup>

§ 591. **When a Correspondent Bank can hold Paper sent to it for Collection, or the Proceeds of it, against the real Owner.** — When the last bank has successfully effected the collection, it is directly liable to the owner to pay the money over to him only until such time as it has actually remitted the amount to its predecessor.<sup>1</sup> But some nice questions have arisen where such predecessor, intervening between the real owner of the paper and the bank actually receiving the money, becomes insolvent before the receiving bank has actually paid over the amount to this predecessor. The general rule of law is, that if a person employs an agent to collect money under such circumstances that the agent naturally employs a sub-agent to accomplish the actual collection, then the principal will be entitled to sue the sub-agent, and collect the money directly from him without regard to the relationship or condition of accounts existing between such agent and sub-agent, and although the sub-agent had no knowledge that his employer was an agent, and not a principal.<sup>1a</sup> But if the owner has delivered the paper to the agent with no *indicia* whatsoever to show that such agent is not the owner, and the sub-agent receives it from the agent supposing him to be the owner, and gives him credit upon the strength thereof, then the principal cannot recover from the sub-agent.<sup>2</sup> New York, as we shall see, makes one exception to this rule, resulting from its doctrine that one who takes paper merely as collateral for a pre-existent debt, not parting actually with value nor extending credit on the faith of the particular note or bill, is not a holder for value. The same doctrine is held in Wisconsin, Tennessee, and Pennsylvania.

<sup>10</sup> *State v. Thomas*, 53 Neb. 464, 73 N. W. 922; *Hatch v. National Bank*, 147 N. Y. 184, 41 N. E. 403.

<sup>1</sup> § 591. *Union Bank v. Johnson*, 9 Gill & J. (Md.) 297.

<sup>1a</sup> *Stevenson v. Bank*, 113 N. C. 488, 18 S. E. 695.

<sup>2</sup> *Wilson v. Smith*, 3 How. 763, 11 L. ed. 820; *Bank of the Metropolis v. New England Bank*, 1 *id.*, 234; s. c. 6 *id.*, 212; *Miller v. Farmers & Mechanics' Bank*, 30 Md. 392; and see *Cecil Bank v. Farmers' Bank*, 22 Md. 148; *Sweeny v. Easter*, 1 Wall. 166, 17 L. ed. 681; *Continental National Bank v. First National Bank*, 84 Miss. 103, 36 So. 189 (1904); *Garrison v. Union Trust Co.*, 139 Mich. 392, 102 N. W. 978, 111 Am. St. Rep. 407, 70 L. R. A. 615 (1905).

§ 592. The leading case illustrative of this principle is that of the *Bank of the Metropolis v. New England Bank*. The latter gave to the Bank of the Commonwealth for collection a piece of negotiable paper indorsed generally, so that, for all that appeared upon it, the Bank of the Commonwealth might be the sole and real owner. The Bank of the Commonwealth forwarded it to its correspondent, the Bank of the Metropolis, with which it had a running account. That bank collected it, and gave the Bank of the Commonwealth credit for it upon the running account. The Bank of the Commonwealth failed, being indebted to the Bank of the Metropolis, and soon afterward the Bank of the Metropolis was notified of the true ownership of this piece of paper; the latter refused, however, to account to the New England Bank, which accordingly brought suit. The case is first reported in 1 How. 234; but at a second trial at *nisi prius* in the lower court the rulings of the Supreme Court appeared to have been so misunderstood that that court reiterated them with much clearness and succinctness in the following shape:—

1. If, upon the whole evidence before them, the jury should find that the Bank of the Metropolis, at the time of the mutual dealings between them, had notice that the Commonwealth Bank had no interest in the bills and notes in question, and that it transmitted them for collection merely as an agent, then the Bank of the Metropolis was not entitled to retain the money as against the New England Bank for the general balance of the account with the Commonwealth Bank.

2. And if the Bank of the Metropolis had not notice that the Commonwealth Bank was merely an agent, but regarded and treated it as the owner of the paper transmitted, yet the Bank of the Metropolis is not entitled to retain against the real owners, unless credit was given to the Commonwealth Bank, or balances suffered to remain in its hands, to be met by the negotiable paper transmitted, or expected to be transmitted, in the usual course of the dealings between the two banks.

3. But if the jury find that, in the dealings mentioned in the testimony, the Bank of the Metropolis regarded and treated the Commonwealth Bank as the owner of the negotiable paper which it transmitted for collection, and had no notice to the contrary, and, upon the credit of such remittances made or anticipated in the usual course of dealing between them, balances were from time to time suffered to remain in the hands of the

Commonwealth Bank, to be met by the proceeds of such negotiable paper, then the plaintiff in error (the Bank of the Metropolis) is entitled to retain against the defendant in error (the New England Bank) for the balance of account due from the Commonwealth Bank.

Chief Justice Taney, in the first opinion in *Bank of the Metropolis v. New England Bank*, expressly denied that the former was put upon its inquiry as to the true ownership of the paper, the indorsement by the true owner being general, and not "for collection." The cited cases also establish that the collecting bank, the sub-agent, may retain the money if, without making an actual payment, it has merely given credit to the agent, or suffered balances to its own credit to remain undrawn with the agent, upon the strength of these receipts. But unless it has made some payment, or suffered a balance to remain undrawn, or otherwise substantially relied on the agent's ownership so that it would be unjustly prejudiced by the denial of that ownership, then it cannot retain the money. The true owner, by indorsing "for collection", could save all question;<sup>1</sup> but if he chooses to neglect this precaution, to indorse generally, and thereby to permit his agent to appear as the owner, then if a sub-agent or any other person be misled and a loss occurs, it is proper that the owner whose carelessness has given opportunity for the sub-agent to be deceived should, as between those two, bear the loss.

Where a negotiable instrument,<sup>2</sup> indorsed and delivered in blank to a bank, though in fact only for collection, is sent by it to another bank for "collection and credit" before maturity, and the latter receives it without notice that it does not belong to the former, it may lawfully retain the proceeds of the collection to satisfy a claim for a general balance against the other bank, if that balance has been allowed to arise and remain on the faith of receiving payments from such collections pursuant to a usage between the two banks.<sup>2a</sup>

Where the second bank credits the proceeds of the note to the first bank, but extends no credit nor makes any advances on the note, the owner may recover the amount of the note from the

<sup>1</sup> § 592. *Cecil Bank v. Farmers' Bank*, 22 Md. 148; *Amalgamated Sign Co. v. United States National Bank*, 187 Fed. 746 (1911).

<sup>2</sup> *Viekrey v. State Savings Assoc.*, 21 Fed. 773 (1884).

<sup>2a</sup> Quoted in *Garrison v. Union Trust Co.*, 139 Mich. 392, 102 N. W. 978, 111 Am. St. Rep. 407, 70 L. R. A. 615 (1905).

second bank.<sup>3</sup> In *Millikin v. Shapleigh*,<sup>4</sup> it was said that, if the banks have mutual and extensive dealings on account current, each has a lien on paper sent by the other for collection; but in the absence of "mutual arrangement or previous course of dealing between the parties, whereby it is expressly or impliedly understood that such remittances of paper are to go to the credit of the previous account, when received, and no advance is made nor any credit given on the basis of the particular bill, and one bank merely passes the proceeds of paper transmitted for collection to the credit of the other on a subsisting indebtedness which it happens to have at the time" against the other, "there is no such lien, and no right to apply the money collected in that manner; but the real owner may maintain an action to recover the amount."

When a collecting bank receives from another bank for collection and credit a check indorsed in blank, it becomes a purchaser for value of such check when it collects the check and pays drafts against the account and makes remittances, and upon the insolvency of the transmitting bank it may recover the full value of the check from the maker even though there is a balance in its favor between it and the transmitting bank.<sup>5</sup>

§ 593. The words "**For Collection**", appended to an indorsement, limit the effect which the indorsement would have without them, and warn subsequent takers that the purpose of the indorsement, though in blank, is not to transfer the ownership of the note, or its proceeds. Such an indorsement is not intended to give currency or circulation to the paper, but has an effect precisely the reverse, prevents further circulation, and limits the authority of the holder to the act of collection for the benefit of the indorser.<sup>1</sup> The indorsement for collection, in the cited case, was not made

<sup>3</sup> *Bury v. Woods*, 15 Mo. App. 245 (1885).

<sup>4</sup> 36 Mo. 599.

<sup>5</sup> *Amalgamated Sugar Co. v. United States National Bank*, 187 Fed. 746 (1911).

<sup>1</sup> § 593. *Sweeny v. Easter*, 1 Wall. 166, 17 L. ed. 681; *White v. National Bank*, 102 U. S. 658, 26 L. ed. 260; *Bank of Metropolis v. First National Bank*, 22 Blatchf. 58; *Cecil Bank v. Farmers' Bank*, 22 Md. 148; *First National Bank v. Reno County Bank*, 1 McCrary 491 (1880); *Ex parte Pease*, 19 Vesey 25; 1 Daniels Neg. Inst., § 698; *Blaine v. Bourne*, 11 R. I. 119; *Treuttel v. Barndon*, 8 Taunt. 100; *Wilson v. Holmes*, 5 Mass. 543; *Hook v. Pratt*, 78 N. Y. 371; *Atkins v. Cobb*, 56 Ga. 86; *Eddie v. East India Co.*, 2 Burr. 1216, 1227; *Brown v. Jackson*, 1 Wash. Cir. Ct. 512; *Tucker Manuf. Co. v. Fairbanks*, 98 Mass. 101; *Mechanics' Bank v. Valley Packing Co.*, 4 Mo. App. 200; s. c. 70 Mo. Rep. 643; *First National Bank v. First National Bank*, 76 Ind. 561; *Hoffman v. First National Bank of Jersey City*, 46 N. J. L. 604 (1884).

by the owner, but by his agent in transmitting to the sub-agent. But the opinion makes it perfectly clear that, had the owner himself so indorsed, he would have been protected. So also it has been elsewhere said by the same court, that an indorsement "for collection means simply to rebut the inference from the indorsement that the agent is the owner of the draft. It indicates an agency."<sup>2</sup> The indorsement, in the former case, was in fact made by the agent in transmitting to the sub-agent. The suit was between the owner and the sub-agent; the court held that it was error to permit the jury to determine the case, which was special in its circumstances, upon the custom of bankers in respect of such paper generally.<sup>3</sup>

In Georgia the F. Bank indorsed to the C. Bank "for collection on account of F. Bank"; the C. indorsed to D. "for collection on account of the C. Bank." D. collected the money, and, on failure of C. to pay F. on demand, the latter could maintain suit against D. for money had and received, since no title had passed to C.<sup>4</sup>

The M. Bank discounted certain notes for L., crediting him with the amount, and afterward paying it. The M. before maturity sent the notes to the B. Bank (in favor of which L. had originally indorsed the notes) for collection, indorsing them, "Pay Bank of B. or order for collection, account of M. Bank." L., who ran the B. Bank, received the notes, and transferred them before maturity to H. in payment of a debt. It was held that the indorsements were notice to H. of the title of M.<sup>5</sup>

§ 594. In *Wyman's Case*,<sup>1</sup> the plaintiff, W., drew on D. a draft payable to the order of C., a banker, and delivered it to C. to collect and credit the proceeds to the plaintiff. C. transferred it to the defendant, indorsed, "Pay to the order of the Colorado Bank for account of C.", with instructions to collect and credit C. This was done, and C. failing, W. sued the Colorado Bank for the proceeds of the draft. But he did not recover, for the court said :

<sup>2</sup> *National Bank of Commerce v. Merchants' National Bank*, 91 U. S. 92, 23 L. ed. 208.

<sup>3</sup> *Sweeny v. Easter*, 1 Wall. 166, 17 L. ed. 681.

<sup>4</sup> *Central R. R. Banking Co. v. First National Bank of Lynchburg*, 73 Ga. 383 (1884), citing *White v. Miners' National Bank*, 102 U. S. 658, 26 L. ed. 250.

<sup>5</sup> *Merchants' National Bank v. Hanson*, 33 Minn. 40, 21 N. W. 849 (1884).

<sup>1</sup> § 594. *Wyman v. Colorado National Bank*, 5 Colo. 30.

1. One who acquires negotiable paper *bona fide* for value from one capable of transferring it is unaffected by prior equities unless he had notice of them. 2. The indorsement of C. gave the Colorado Bank the title, and as receiving paper as security for pre-existing debt is a sufficient consideration to make the bank a holder for value, and as C. owed the defendant a balance, its title is good. 3. By the law merchant a bank has a lien on all securities deposited by a customer for its general balance, unless there is an express or implied contract inconsistent with such lien. 4. It is elementary law that where one of two innocent parties must suffer by the act of a third, he who has enabled that third person to do the act must bear the loss; and in this case W. could have saved all trouble by indorsing for collection.

When advances are made on a note received for collection, the bank is the owner. The remitting bank is the agent of the holder, and the latter must bear any loss arising from his own negligence or the omissions or fault of his agent.<sup>2</sup>

A bank's merely crediting the amount collected on a note or draft does not constitute it a *bona fide* purchaser for value.<sup>3</sup>

§ 595. **Michigan.** — A firm had been in the habit of indorsing in blank such drafts or checks as were drawn to its order, and depositing them in a local bank as so much money subject to be drawn on. One of the firm left at the bank without any instructions a bank check so indorsed, and the bank forwarded it for collection to the defendant bank, directing it to send the local bank \$2000 currency, which was done; \$3000 more was sent up to the 3d instant, which remittances would not have been made except on faith of the paper. It was the regular course of business between the banks to make such remittances on such security. On the 5th the local bank failed, and the depositor brought trover against the defendant bank for the draft. The court decided in favor of the defendant.<sup>1</sup>

§ 596. Where a draft is deposited in a bank without instructions that it shall be treated as a separate fund, and is forwarded by the bank to its correspondent for collection and deposit to its credit, and the fund in the correspondent bank is continually

<sup>2</sup> Moore v. Meyer, 57 Ala. 20.

<sup>3</sup> First National Bank v. Nelson, 105 Ala. 180, 16 So. 707; Baeschlin v. Chamberlain Banking House, 67 Neb. 196, 93 N. W. 412 (1903); First National Bank v. McNairy, 122 Minn. 215, 142 N. W. 139, 1914D Ann. Cas. 977, n.

<sup>1</sup> § 595. Cody v. City National Bank, 55 Mich. 379, 21 N. W. 373.

changing by reason of drafts and deposits so that no specific moneys can be identified, the original depositor can, on failure of the first bank, recover no more than his *pro rata* share, like any other creditor.<sup>1</sup>

The mere giving credit by a bank for a note which credit was never drawn upon before the maturity of the note, does not constitute the bank a purchaser for value.<sup>2</sup>

§ 597. **Massachusetts.** — A simple case was one in which the owner of a negotiable promissory note, indorsed in blank by the payee, gave it to an attorney at law for collection. The attorney deposited it for collection in a bank with which he had dealings, making no statement to indicate that it was for account of any other person than himself. The bank collected the note, and credited the amount against indebtedness then owing to itself from the attorney. A year afterward, the owner of the note, then first becoming aware of its payment, sought to compel the bank to pay him the amount; the attorney meanwhile had become bankrupt, and a settlement of his accounts with the bank had been made, in which he had received credit for the amount of the note. The court held that the owner of the note could not recover from the bank.<sup>1</sup>

§ 598. **England.** — Bank notes and bills of exchange were paid in to a country banking firm to be remitted to London to meet certain acceptances. The firm sent to its London agent the bills and some bank notes, with a letter directing him to pay a certain sum of money, and giving notice of the acceptances as payable at the agent bank. The firm stopped payment, owing a large balance to the London bank. It was held, that, as between J. and the London bank, there was no appropriation of the bills and notes to meet the acceptances, and that the London bank could retain them without meeting the acceptances.<sup>1</sup>

§ 599. **New York** has peculiar views on this subject of title. It admits that any advance actually made on the faith of paper

<sup>1</sup> § 596. *Edson v. Angell*, 58 Mich. 336, 25 N. W. 307 (1885).

<sup>2</sup> *Drover's National Bank v. Blue*, 110 Mich. 31, 67 N. W. 1105. But a bank may be a holder in due course and thus acquire title to bonds which were stolen from a guest of a hotel by its manager. *Rayner v. Sligh Furniture Co.*, 180 Mich. 171, 146 N. W. 665 (1914).

<sup>1</sup> § 597. *Wood v. Boylston National Bank*, 129 Mass. 358. See *First National Bank v. City National Bank*, 102 Mo. App. 357, 76 S. W. 489 (1902).

<sup>1</sup> § 598. *Johnson v. Robarts*, L. R. 10 Ch. App. 505.

without notice, makes the bank a holder for value, but holds that taking paper as collateral for a pre-existing debt does not constitute a *bona fide* holding, that a bank cannot hold paper not belonging to its debtor merely because of a general balance, and that a bank is put on its inquiry to find out if a general indorsement is only for collection or is a transfer of title. The last ruling is clearly indefensible, as breaking down security in business and injuring foresight, and the doctrine as to pre-existing debt is little better. The cases in New York are not reconcilable with each other.

In *McBride v. Farmers' Bank*,<sup>1</sup> the court declared that the doctrine of the *Bank of the Metropolis v. New England Bank* had never been adopted in New York, but that the opposite had been frequently and consistently maintained, and it preferred to follow the precedents of the State adjudications; saying that a course of dealing and habit of accounting between the banks could not be allowed to affect the rights of the holder and owner of the paper, who has never parted with his property in it.

In another case, the plaintiff, being the owner of a note, indorsed it in blank, and deposited it in the M. Bank for collection. By this bank it was forwarded to the defendant bank, with directions to collect and credit the M. Bank with the proceeds. This was done by the defendant. At the time of the forwarding, the M. Bank was indebted to the defendant bank, and, after receipt of the note, the defendant paid drafts drawn upon it by the M. Bank. Defendant had no knowledge of the ownership of the note. *Held*, that defendant could not set up, against the suit by the real owner, that it held the note or proceeds for value by reason of the indebtedness of the M. Bank already existing at the time of the receipt of the note by the defendant; neither by reason of the fact that defendant had, subsequently to such receipt, paid drafts of the M. Bank, unless these drafts had been actually paid upon the faith of this note.<sup>2</sup>

In *Van Amee v. Bank of Troy*,<sup>3</sup> which was cited and relied upon

<sup>1</sup> § 599. 26 N. Y. 450; citing as authorities in the State of New York, *Coddington v. Bay*, 20 Johns. (N. Y.) 637; *Rosa v. Brotherson*, 10 Wend. (N. Y.) 86; *Stalker v. McDonald*, 6 Hill (N. Y.) 93; *Youngs v. Lee*, 2 Kern. (N. Y.) 551. Subsequently, *McBride v. Farmers' Bank* was relied upon as authority in *Commercial Bank of Clyde v. Marine Bank*, 3 Keyes (N. Y.) 337; *Lindauer v. Fourth National Bank*, 55 Barb. (N. Y.) 75.

<sup>2</sup> *West v. American Exchange Bank*, 44 Barb. (N. Y.) 175.

<sup>3</sup> 8 Barb. (N. Y.) 312.



in *McBride v. Farmers' Bank*, A. indorsed over a note to B. Bank, which transmitted to C. Bank, which collected. A. was allowed to recover from C. Bank, despite the course of accounting between it and B. Bank. The court, loath to run counter to the distinguished authority of the Supreme Court of the United States, sought to reconcile its decision with that of *Bank of the Metropolis v. New England Bank*, by saying that in this case C. bank was put upon its inquiry as to the ownership by any other person than B. Bank, and that the circumstances precluded the possibility of supposing any agreement that a lien on this paper should exist between the banks. But this theory was quite illusory; the State court might as well have come out boldly and overruled or disagreed with the national court. It based its notion of C. Bank being put upon inquiry wholly upon the fact that A. had indorsed over to B. Bank; and a similar indorsement existing in the case before the Supreme Court had not been regarded as putting the third bank upon inquiry, but as passing title for all practical purposes to the second bank. That court say, in substance, that the indorsement, being general, vests such an apparent title in the indorsee bank that the subsequent banks are justified, without inquiry, in treating the paper as if the real and absolute title were in that bank. It is upon this principle that the whole decision turns. But the cases upon the other side hold that indorsement generally, being a common method where only power to collect, and not the outright title, is intended to be conveyed, ought not in fact to be considered as sufficient ground upon which the subsequent banks can assume that the indorsee bank is the real or controlling owner of the paper, but ought rather to put such subsequent banks upon their inquiry, to learn whether the indorsee bank is simply indorsee for collection, or really for ownership.<sup>4</sup> According to this view indorsement cannot safely be taken as conclusive of anything concerning the title or the power to pledge.

A bank's merely discounting a note and crediting the amount upon its books does not constitute it a holder for value.<sup>5</sup>

The City of Rochester, to which a draft for \$6500 had been

<sup>4</sup> *McBride v. Farmers' Bank*, and *Van Amee v. Bank of Troy*, *supra*; *Bank of Washington v. Triplett*, 1 Pet. 25, 7 L. ed. 37.

<sup>5</sup> *Central National Bank of the City of New York v. Valentine*, 18 Hun (N. Y.) 417; *Dykman v. Northbridge*, 80 Hun (N. Y.) 158; *Richards v. Street*, 31 App. Cas. (D. C.) 427 (1913).

sent by the holder for collection, caused it to be collected by the Auburn Bank, where it was payable, and the proceeds to be sent to the American Exchange Bank to pay a debt due the latter from the City Bank, the American Exchange Bank taking it in good faith. *Held*, that the holder could not recover the amount from the last-named bank.<sup>6</sup>

It was again decided, in Stark's case,<sup>7</sup> that a bank could not hold paper for a general balance when the paper does not belong to its debtor. Upon the trial of this action, it appeared that a note and draft were indorsed in blank by the owners, firm of Mohler & Sons, and delivered with letters of instruction to the State Bank of West Virginia for collection. By this bank they were sent to the defendant bank, with a letter of advice and an indorsement, each to the effect that they were sent for collection. After they had been received by the defendant, and before either of them had been collected, the State Bank of West Virginia became insolvent and failed, and the firm of Mohler & Sons assigned note and draft and their right of action to the plaintiff, who, after a refusal of the defendant to comply with a demand for the note and draft made by him, brought this action for their conversion.

*Held*, that as no draft or check was drawn upon the defendant by the Virginia bank, and no advance was ever made by the defendant based upon either note or draft, it had no legal right to hold the paper for its security on account of the general balance in its accounts against the Virginia bank. What it was legally bound to do, as the State Bank had failed and discontinued its business, was to return the paper to its owners; and as it failed to do that when a proper demand for it was made, and afterward proceeded to collect the note and draft, it was chargeable with a conversion of those instruments.

P. gave a bill to D. to collect. D. transmitted to S. By the indorsements D. appeared to be the real owner. S. collected and gave D. credit on general account, D. being indebted to S. at the time. When the bill was paid to S. and credited to D., the latter had failed. No new transaction arose between D. and S. after payment of the bill. The court said, that, if D. had owed S. nothing,

<sup>6</sup> *Charlotte Iron Works v. National Bank Exchange*, 34 Hun (N. Y.) 26.

<sup>7</sup> *Stark v. United States National Bank*, 41 Hun (N. Y.) 506, citing *Scott v. Ocean Bank*, 23 N. Y. 289; *McBride v. Farmers' Bank*, 26 *id.*, 450; *Dickerson v. Wason*, 47 *id.*, 439; *Jessop v. Miller*, 1 Keyes (N. Y.) 321; *Sprights v. Hawley*, 39 N. Y. 441; *Bank of Rochester v. Jones*, 4 Comst. (N. Y.) 497; *Cayuga County Bank v. Daniels*, 47 N. Y. 631.

P. clearly could recover, and it could see no reason why he should be barred because D. was debtor of S. The evidence shows that S. incurred no new responsibility on the faith of this bill, and *his transactions with D. remained in all respects the same as they would have been if this bill had never been transmitted to him.* But if credit had been extended and balances suffered to remain, or credit given in any way on faith of the paper transmitted or *expected to be received* in the usual course of business, the hazard run by the extension of credit would make S. a holder for value, as truly as if he had made direct advances of money.<sup>8</sup>

§ 600. **The New York View does not commend itself**, either in respect of reason or authority.<sup>9</sup> A pre-existing debt is a sufficient consideration as between the parties for the transfer of collateral security, and constitutes the creditor a holder for value beyond equities.<sup>1</sup>

Taking a negotiable instrument as security for a pre-existing debt without any agreement for delay is sufficient to make the party a *bona fide* holder for value.<sup>2</sup> The holder is naturally lulled into security and inactivity through faith in the paper, and it is impossible to draw a line between value given at the time and previous consideration, if there is good faith in both cases. If money is paid or service rendered, and a note or check is given upon such consideration, no case doubts that the holder is protected; yet *some interval of time elapses between the consideration and the delivery of the paper.* What difference can it make in the rights of the parties whether this interval be one moment, one month, or one year, other facts being the same?

<sup>8</sup> *Wilson v. Smith*, 3 How. 770, 11 L. ed. 820.

<sup>9</sup> § 600. *Garrison v. Union Trust Co.*, 139 Mich. 392, 102 N. W. 978, 111 Am. St. Rep. 407, n., 70 L. R. A. 615 (1905).

<sup>1</sup> *Des Moines National Bank v. Chisholm*, 71 Iowa 675, 33 N. W. 234.

<sup>2</sup> *McCarty v. Roots*, 21 How. 432, 16 L. ed. 162; *Railroad Co. v. National Bank*, 102 U. S. 14, 26 L. ed. 61; although the transaction was in New York, the court holding that the undertaking of the bank to fix the liability of the parties was sufficient to protect it. It assumed the duties and responsibilities of a holder, and should have the protection of one. *Maitland v. Citizens' National Bank*, 40 Md. 540 (1874); *Straughan v. Fairchild*, 80 Ind. 598; *Atkinson v. Brooks*, 26 Vt. 569. Paper security as security for pre-existing debt good. See *Fisher v. Fisher*, 98 Mass. 303; *Roberts v. Hall*, 37 Conn. 205; *Bank of Republic v. Carrington*, 5 R. I. 515; *Mix v. National Bank*, 91 Ill. 20; *Robinson v. Smith*, 14 Cal. 94; *Boatman's Savings Institute v. Holland*, 38 Mo. 49; *Armour v. McMichael*, 36 N. J. L. 92; *Bank v. Chambers*, 11 Rich. (S. C.) 657; *Gibson v. Conner*, 3 Ga. 47; *Giovanovich v. Citizens' Bank*, 26 La. Ann. 15; *Greneaux v. Wheeler*, 6 Tex. 55.

In *Railroad Co. v. National Bank*, the court said: "Our conclusion is, that the transfer before maturity of negotiable paper as security for an antecedent debt merely, without other circumstances, if the paper be so indorsed that the holder becomes a party to the instrument, although the transfer is without express agreement by the creditor for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of such debt;" and "bills and notes of this kind, indorsed in blank or payable to bearer, when transferred to an innocent holder, create the same liability as if indorsed at the time of the transfer."

§ 601. **Connecticut.** — In the *Stonington* case the bill was indorsed from bank to bank, and the court held parol evidence admissible to show that the indorsements were only for collection, and ruled that if the last bank, the defendant, had paid value for the bill, it could hold against the plaintiff; but as it had sustained no loss on account of the transaction, it was not within the spirit of the rule protecting a *bona fide* holder, and there was no reason why the real owner should be deprived of his property merely because of a custom among the banks themselves as to crediting bills on account. Such a custom cannot affect third parties without their consent, express or implied.<sup>1</sup>

§ 602. **In Pennsylvania**, also, a general balance is not sufficient to constitute the correspondent bank a holder for value.<sup>1</sup> And the sub-agent cannot, on failure of its correspondent, credit the proceeds to it unless it has made advances or given new credits on account of it.<sup>2</sup>

§ 603. **Title to Discounted Paper.** — **Kansas, Mass.** — If a bank discounts a note for a customer and places the amount thereof to his credit upon his general deposit account, the bank does not thereby become a holder or purchaser for value so as to be protected against infirmities in the value of the paper;<sup>1</sup> unless, before

<sup>1</sup> § 601. *Lawrence v. Stonington Bank*, 6 Conn. 521 (1827).

<sup>1</sup> § 602. *First National Bank v. Gregg*, 79 Pa. St. 384; *Jones v. Milliken*, 41 Pa. St. 251.

<sup>2</sup> *Hackett v. Reynolds, Lamberton & Co.*, 114 Pa. St. 328, 6 Atl. 689 (Oct., 1886).

<sup>1</sup> § 603. *Mann v. Second National Bank of Springfield*, 30 Kan. 412, 1 Pac. 579; *Albany County Bank v. People's Ice Co.*, 92 App. Div. 47 (1904), 86 N. Y. S. 773; *Consolidated National Bank v. Kirkland*, 99 App. Div. 121 (1904), 91 N. Y. S. 353; *Wallabout Bank v. Peyton*, 123 App. Div. 727 (1908), 108 N. Y. S. 42; *National Bank of Commerce v. Armbruster*, 42 Okla. 656, 142 Pac. 393 (1914).

receiving notice of such infirmities, it pays out on account of the depositor so much that the balance of his deposit is less than the amount credited to him upon the discount.<sup>2</sup> But it seems that the presumption, by reason of the bank's possession, is that the bank is a purchaser for value, which presumption must be defeated by evidence showing the state of the customer's account.<sup>3</sup>

§ 604. **Title between Third Parties.** — The presumption is that a deposit belongs to the depositor individually,<sup>4</sup> and the addition of a title, such as "S. S., Collector", or "H. R., Co. Treas.",<sup>5a</sup> does not of itself overcome the presumption<sup>5b</sup>; they are mere

<sup>2</sup> *Fox v. Bank of Kansas City*, 30 Kan. 441, 1 Pac. 789; *Fulton National Bank v. Gosline*, 168 Mass. 86, 46 N. E. 406; *Richards v. Street*, 31 App. Cas. (D. C.) 427 (1913); *National Bank of Commerce v. Armbruster*, 42 Okla. 656, 142 Pac. 393 (1914). In Minnesota if any substantial portion of the purchase price is checked out the bank is a *bona fide* holder. *First National Bank v. Persall*, 110 Minn. 333, 125 N. W. 506, 675, 136 Am. St. Rep. 499 (1910). See *First National Bank v. McNairy*, 122 Minn. 215, 142 N. W. 139, 1914D Ann. Cas. 977, n. (1913).

<sup>3</sup> *Mann v. Second National Bank of Springfield*, 34 Kan. 746, 10 Pac. 150. See *National Bank of Commerce v. Armbruster*, 42 Okla. 656, 142 Pac. 393 (1914); *First National Bank v. McNairy*, 122 Minn. 215, 142 N. W. 139, 1914D Ann. Cas. 977, n.

<sup>4</sup> § 604. *Hemphill v. Yerkes*, 132 Pa. St. 545, 19 Atl. 342; *National Bank v. Maltby*, 53 Kan. 567, 36 Pac. 1000; *Bessemer Savings Bank v. Anderson*, 134 Ala. 343, 32 So. 716, 92 Am. St. Rep. 38 (1901); *Lowman v. Blain County Bank*, 40 Okla. 519, 139 Pac. 952 (1914); *Silsbee State Bank v. French Market Grocery Co.*, 104 Tex. 629, 132 S. W. 465, 34 L. R. A. (n. s.) 1027, n. (1910); *Boyle v. Northwestern National Bank*, 125 Wis. 498, 103 N. W. 1123, 110 Am. St. Rep. 844, 1 L. R. A. (n. s.) 577, n. (1905); *Nolting v. National Bank*, 99 Va. 54, 37 S. E. 804 (1901), "Cashier."

In Tennessee if the cashier of a water company indorses the name of the company on the checks of the company and then indorses thereon his own name and deposits them to his individual credit the transaction is irregular and unusual and should put the bank on sharp inquiry. *Knoxville Water Co. v. East Tenn. National Bank*, 123 Tenn. 364, 131 S. W. 447 (1910).

<sup>5a</sup> But when, at the time of such deposit, the depositor notifies the bank that in case of his death the money should be paid to specified officers of an association there is sufficient notice that the money does not belong to the depositor. *Parks v. Knickerbocker Trust Co.*, 137 App. Div. 719 (1910), 122 N. Y. S. 521.

When money has been deposited in the name of "C. H. M. Treas.", who transferred it to the bank by checks drawn in the name of C. H. M. Treas. and converted it to the use of the bank the same may be recovered in equity, but not at law. *State Bank v. Hawkeye Gold Dredging Co.*, 177 Fed. 164 (1910).

<sup>5b</sup> In Massachusetts a deposit in the name of "W. S. H. agent" is *prima facie* evidence that it does not belong to W. H. S. but belongs to an undisclosed principal, and, without other evidence, it cannot be trusted

*descriptio personæ*.<sup>0c</sup> These annexations may be only for designation (or for vanity), but in connection with other facts may be evidence that the deposit is a public one.<sup>1</sup> It is well established that such titles impart no notice that negotiable paper so indorsed is trust property.<sup>2</sup> But where a depositor has two deposits, one in his individual name and one in his name as trustee or treasurer, it would seem that the addition could not be regarded as of no weight.

(a) If an attorney,<sup>3</sup> or administrator<sup>4</sup> (even though having no other account, and informing the bank of the character of the fund<sup>4</sup>), or any agent or trustee,<sup>5</sup> deposits in his own name the money of his principal or the *cestui*,<sup>5a</sup> it is the agent's loss in case the bank fails. The burden is on the party claiming a deposit that stands in the name of another; the law presumes truth and regularity.<sup>6</sup>

as the property of W. S. H. Jordan Marsh Co. v. Hale, 219 Mass. 495, 107 N. E. 357 (1914).

<sup>0c</sup> See Sparrow v. State Exchange Bank, 103 Mo. App. 338, 77 S. W. 168 (1903), citing cases.

<sup>1</sup> Eyeran v. Second National Bank, 13 Mo. App. 289, 84 Mo. 408; Swartwout v. Mechanics' Bank, 5 Denio (N. Y.) 555; Staib's Estate (Bender's Appeal), 11 Pa. St. 447; Pittsburg v. First National Bank, 230 Pa. St. 176, 79 Atl. 406 (1911); State v. Calcasieu National Bank, 132 La. 879, 61 So. 857 (1913), money deposited to the credit of a tax collector.

<sup>2</sup> Powell v. Morrison, 35 Mo. 244; First Denton National Bank v. Kenney, 116 Md. 24, 81 Atl. 227, 1913B Ann. Cas. 1337, n., check payable to W. H. D. Atty. But see Bank of Hickory v. McPherson, 102 Miss. 852, 59 So. 934 (1912), where the check was payable to "G. B. H. Commissioner"; and see United States Fidelity etc. Co. v. Adoue, 104 Tex. 379, 137 S. W. 648, 1914B Ann. Cas. 667, n., 37 L. R. A. (N. S.) 409, n., holding that when money is deposited by a certificate of deposit in the name of "A. J. C. Guardian" the bank is charged with notice that it is dealing with trust property. See, also, Burstein v. People's Trust Co., 143 App. Div. 165 (1911), 127 N. Y. S. 1092, which holds that when a bank credits a check drawn to the order of a partnership and indorsed in the firm's name by the manager, and in the manager's own name, to the account of the manager it is guilty of conversion.

<sup>3</sup> Robinson v. Ward, 2 Car. & P. 59.

<sup>4</sup> Williams v. Williams, 55 Wis. 300, 12 N. W. 465, 13 N. W. 274; Commonwealth v. McAlister, 28 Pa. St. 480.

<sup>5</sup> Norris v. Hero, 22 La. Ann. 605; Shaw v. Bauman, 34 Ohio St. 25.

<sup>5a</sup> When a bank enters a check which it knows represents guardian funds to the personal credit of the guardian it commits a conversion of the fund. United States Fidelity etc. Co. v. People's Bank, 127 Tenn. 720, 157 S. W. 414 (1913).

<sup>6</sup> Egbert v. Payne, 99 Pa. St. 239 (1881); Eresman v. Del. Co. Bank, 1 Pa. St. 144; Gansevoort Bank v. Carragan, 69 N. J. L. 404, 55 Atl. 741, money deposited in the name of a partner may be shown to belong to the firm.

An agent who deposits in a bank money of his principal in his own name, "A. J. Miller, Agent", cannot maintain an action for it in his own name after his agency ceases.<sup>6a</sup>

When money is deposited in a bank by C. as "Atty.", if the bank has no further information as to the ownership of the fund so deposited than that indicated by the designation "Atty." the bank will be justified in paying the money over to the officer, leaving a writ of attachment in an action against C.<sup>6b</sup>

### *Husband and Wife*

(b) A deposit in the name of husband and wife, by reason of their unity, goes entire to the survivor.<sup>7</sup> Neither party can make a gift of more than one-half.<sup>7a</sup>

A husband desired that one-half of his earnings should go to his wife, to be her own property, and placed the money in her hands with the understanding that it should be so deposited as to be hers. This understanding made her the husband's agent to make the deposit and transfer as directed. She carried the money to the savings bank and, *as her husband's agent*, had deposits made in her name *as an individual*, and received a bank-book made out in her name. *Held*, the title to the deposit passed to the wife.<sup>7b</sup>

Where money is deposited in the name of children and the entry

<sup>6a</sup> *Miller v. State Bank*, 57 Minn. 319, 59 N. W. 309; *Smith v. Freeholders of Essex*, 48 N. J. Eq. 627, 23 Atl. 268.

Where an agent has general authority to indorse bank checks of his principal he may assign the title of such check to himself, and when such agent indorses a check with the name of his principal and offers it for deposit to his private account in a bank, the bank need not inquire as to his authority to so deposit it before accepting the same and will not be liable to the principal in the absence of any known limitation upon the authority of the agent, and the burden is upon the principal to show that the bank had knowledge of the limitation of authority. *Mott Iron Works v. Metropolitan Bank*, 78 Wash. 294, 139 Pac. 36 (1914). But a principal who deposits money in the name of one known by the bank to be his agent and who has power to draw, may maintain an action for the balance after the authority of the agent has been revoked. *Société Coloniale Anversoise v. London etc. Bank*, (1911) 2 K. B. 1024.

<sup>6b</sup> *Cunningham v. Bank of Nampa*, 13 Idaho 167, 88 Pac. 975, 121 Am. St. Rep. 257, 10 L. R. A. (N. S.) 706, n. (1907).

<sup>7</sup> *Platt v. Grubb*, 41 Hun (N. Y.) 447; *Bertles v. Nunan*, 92 N. Y. 152; *Baker v. Hedrich*, 85 Md. 645, 37 Atl. 363.

<sup>7a</sup> *Wetherow v. Lord*, 41 App. D. (Hun, N. Y.) 413.

<sup>7b</sup> *Brown v. Brown*, 174 Mass. 197, 54 N. E. 532. And the fact that the husband possessed authority to draw the money of his wife at his pleasure did not invest him with the ownership of the account. *Martin v. Munroe*, 121 Md. 679, 89 Atl. 319 (1913).

is signed "Mr. and Mrs. B., payable at our death to above children" a trust is created and the equitable title passes to the children.<sup>7c</sup>

*Deposit to Order of A. or B.*

(c) Where money was deposited by A. and by B. in their mutual presence, to be drawn by either or both, it was held that on the death of A. the right to the whole did not pass to B.; but A.'s wife, who had the pass-book, was entitled to receive so much of the existing fund as had been contributed by her husband.<sup>8</sup>

And where money is deposited — "A. and B., payable to either or survivor", and it appears that the depositor A. always kept the deposit book, and B. knew nothing of the deposit until after A.'s death, the deposit remains the property of A.'s estate.<sup>8a</sup>

*Administrator*

(d) Where S. deposits to the credit of "S., Trustee for C. B.", the right of S. to demand and receive the fund as trustee passes to her administrator, and the bank is protected in a payment to him if it has not adverse orders from the *cestui*.<sup>9</sup>

(e) A depositor, D., assigned his bank-book to H., and he gave the bank notice. C., a creditor of D.'s, attached the deposit, got judgment, and the bank issued a new book to C.'s lawyer as trustee of the deposit; but it was held that, the assignment and notice being prior to the attachment, H. was the owner of the fund.<sup>10</sup>

When money is deposited in a bank to the credit of an executor who subsequently dies, the right to collect the money passes to the administrator *de bonis non* and not to the administrator of the executor.<sup>10a</sup>

*Deposit Contrary to Law*

(f) Where county money is deposited contrary to law the bank acquires no title, and the county can recover in full from

<sup>7c</sup> Baker v. Baker, 123 Md. 32, 90 Atl. 776 (1914).

<sup>8</sup> Mulcahey v. Emigrant Industrial Savings Bank, 89 N. Y. 435.

<sup>8a</sup> Noyes v. Newburyport Savings Institution, 164 Mass. 583, 42 N. E. 103; Bath Savings Institution v. Fogg, 101 Me. 188, 63 Atl. 731 (1906).

<sup>9</sup> Boone v. Citizens' Savings Bank, 84 N. Y. 83. See 21 Hun (N. Y.) 235.

<sup>10</sup> Commonwealth v. Scituate Savings Bank, 137 Mass. 301.

<sup>10a</sup> Clark's Adm'r v. Farmers' National Bank, 124 Ky. 563, 99 S. W. 674 (1907).



the receiver, even though the funds have been mingled with the bank's.<sup>11</sup>

Where money is deposited to the credit of a tax collector the bank is bound to know that such money belongs to the state or other public body whose taxes he collected and if the bank honors a check drawn by the collector against such deposit in payment of his own debt it becomes liable to the owner of the fund for the amount used therefrom in payment of the check.<sup>11a</sup>

### *Recovery after Death of Agent*

(g) Where an agent deposits moneys in his name as agent, and dies owing his principal, the latter may claim the deposit on his debt.<sup>12</sup>

Where money earned by a deceased mother is deposited in the name of her daughter who holds the pass book, and the husband tacitly approves by making no objection, the daughter who holds the certificate of deposit is the owner of the sum deposited.

§ 605. **Specific Deposit.** — When A. deposits money with directions to pay it on a certain check he has given or will give, the money is A.'s until the bank either pays it or promises the payee to pay it, unless the deposit was made under an arrangement with the payee.<sup>1</sup>

Money deposited by A., to be paid at a certain time to B., cannot before that time be taken by the creditors of B. upon any legal process.<sup>2</sup> So, in England, it has been held that, where money is paid in to the banker by his customer, for the express and declared purpose that the same should be paid over to a third party, nevertheless such third party can enforce no claim against the fund until the banker shall, by some act upon his own part, have

<sup>11</sup> *San Diego County v. California National Bank*, 52 Fed. 59. See *Lucas County v. Jamison*, 170 Fed. 338 (1908).

And when a bank receives from a county treasurer twenty-six checks signed in the name of the county, and made payable to the bank by the treasurer in payment of his own indebtedness the bank is charged with knowledge that the money belongs to the county and not to its treasurer personally. *Northern Trust Co. v. First National Bank*, 25 N. D. 74, 140 N. W. 705 (1913).

<sup>11a</sup> *State v. Calcasieu National Bank*, 132 La. 879, 61 So. 857 (1913).

<sup>12</sup> *Boody v. Lincoln National Bank*, 70 Hun (N. Y.) 392.

<sup>1</sup> § 605. *Mayer v. Chattahoochee National Bank*, 51 Ga. 325 (1874); *Pace v. Howard College Trs.*, 15 Ga. 486 (1854).

<sup>2</sup> *Foxton v. Kucking*, 55 Me. 346.

come under an obligation to pay to him.<sup>3</sup> But many times the third party in such cases has been allowed to recover, not on the ground of title, but of contract. See § 499, n. 1.

When a loan is negotiated through a banker, who receives the money from the lender, and allows the borrower to draw part of it out on check, the remainder is held as the property of the borrower.<sup>4</sup>

§ 606. **Bank Balance as "Cash" or "Money", in Bequests.** — A bank balance, although a simple contract debt, is nevertheless practically nearly or quite equivalent to cash in hand; and this characteristic has been recognized by the courts in various decisions. For example, a bequest of the testator's "money", or "money in hand", or "ready money", or other like phrase, has been held to carry his balance at his banker's.<sup>1</sup>

Money in bank was held to pass by the words "all my stock in trade."<sup>2</sup> So under the words "accounts due",<sup>3</sup> and "all my moneys."<sup>4</sup>

§ 606 A. **Deposit Claimed by Adverse Parties.** — Where a deposit is claimed by two parties a bill of interpleader may be filed by the bank.<sup>1</sup>

<sup>3</sup> *Malcolm v. Scott*, 5 Exch. 610.

<sup>4</sup> *Merriam v. Haas*, 154 U. S. 542, 18 L. ed. 29, 14 Sup. Ct. 1159.

<sup>1</sup> § 606. *Parker v. Marchant*, 1 Y. & Coll. C. C. 290, affirmed 1 Phil. C. C. 356; *In re Powell's Trusts*, 1 Johns. (Eng.) 49; 5 Jur. n. s. 331; *Manning v. Purcell*, 7 De G. M. & G. 55; *Vaisey v. Reynolds*, 5 Russ. 12; *Beck v. Gillis*, 9 Barb. (N. Y.) 35; *Mann v. Mann*, 1 Johns. Ch. (N. Y.) 231; s. c. 14 Jones. (N. Y.) 9; *Fryer v. Ranken*, 11 Sim. (Eng.) 55; *Smith v. Butler*, 1 Jones & Lat. (Eng.) 562; *Stein v. Ritherdon*, 37 L. J. Ch. 369; *Langdale v. Whitfield*, 4 K. & J. 426; 27 L. J. Ch. 795,

<sup>2</sup> *Stuart v. Earl of Bute*, 3 Ves. Jr. 212.

<sup>3</sup> *Burress v. Blair*, 61 Mo. 133.

<sup>4</sup> *Jenkins v. Fowler*, 63 N. H. 244.

<sup>1</sup> § 606 A. *Savings Bank v. Airey*, 95 Mich. 520, 55 N. W. 355.

## CHAPTER XXXVII

### TITLE BY GIFT

§ 607. See Gift of Check, § 548.

A. GIFT INTER VIVOS requires:—

- (1) Intent to transfer the title presently from the donor to the donee, or to some one for the donee.
- (2) Delivery, or actual transfer of possession or control.
- (3) Acceptance, which latter may be presumed. There must be *intent*, manifested in some usual and well-understood manner, as by, —

§ 608. (a) Delivery of savings bank book, with words indicative of intent to pass the title to the deposit from the donor at once.

§ 609. (b) Deposit in name of donee. See § 615 c.

§ 609. A. GIFT BY INDORSEMENT AND DELIVERY OF CHECK.

§ 610. (c) Declaration that the deposit is in trust for the donee, which passes the equitable title, and may be done either by a transfer to a third person in trust for the donee, or by a simple declaration by the donor, oral or written, that he himself holds *in presenti* as trustee for the donee. And some cases hold that such a transaction passes title, even though the *cestui* has not notice, and the donor retains the book; but other cases regard this combination of facts as evidence of intent not to complete the gift. See § 615 c.

B. DONATIO CAUSA MORTIS requires:—

§ 611. (1) Intent to pass title to donee *at the death* of the donor from an existing illness or peril.

§ 612. (2) Transfer of possession, actual or constructive, to the donee, or to some one for him, during the life of the donor, and what constitutes this delivery is a question on which the decisions are not harmonious. Manual transfer of the bank-book is sufficient to pass title to a *savings bank* deposit.

(3) Death of the donor from said illness or peril.

C. NO GIFT.

§ 613. If the transfer is without intent to pass title,

§ 614. Or if the intent is only that title shall pass at the death of the donor (the case not coming within the definition of a *donatio causa mortis*), for this, being a testamentary disposition of property, must conform to the Wills Act.

§ 615. Or if there is no delivery.

§ 608. **Gift Inter Vivos by Transfer of the Bank-Book.** — Delivery of a savings bank book, with entries to the credit of the donor, to the donee or to some other person for him, with intent to vest the title to the deposits in the donee, passes the equitable title to him.<sup>1</sup> A depositor gave his bank-book and an order for payment to his daughter,<sup>1a</sup> and she gave the bank notice. The bank, notwithstanding, paid the fund to the administrator of the depositor. The daughter recovered.<sup>2</sup>

Giving the bank-book to the donee, saying, "Keep this until I call for it, and if I never call for it, it is yours," is a good gift; there is intent, delivery of control, and acceptance.<sup>3</sup> And so, where A. deposits money in the names of himself and B., and sends the book to B. the day before his (A.'s) death with the message, "Tell my mother (B.) to keep it for me," the possession of the book gave B. complete power to draw the money, and made it hers.<sup>3a</sup>

*When Donee is in Possession Already*

Where the donee is present at the time of deposit, and the bank-book is given into his possession, with intent to transfer

<sup>1</sup> § 608. *Hill v. Stevenson*, 63 Me. 364; *Marston v. Marston*, 21 N. H. 491; *Dole v. Lincoln*, 31 Me. 422; *Borneman v. Sidlinger*, 15 Me. 429; *Wells v. Tucker*, 3 Binn. (Pa.) 366; *Union Trust etc. Bank v. Tyler*, 161 Mich. 561, 126 N. W. 713, 137 Am. St. Rep. 523 (1910); *In re Morse's Estate*, 170 Mich. 114, 135 N. W. 1057 (1912); *Goodrich's Ex'r v. Rutland Savings Bank*, 81 Vt. 147, 69 Atl. 651, 17 L. R. A. (N. S.) 181, n. (1908); *Wade v. Smith*, 213 Mass. 34, 99 N. E. 477 (1912); *Meriden Savings Bank v. McCormack*, 79 Conn. 260, 64 Atl. 338 (1906); *Frentz v. Schwarze*, 122 Md. 12, 98 Atl. 438 (1913), the delivery was accompanied by a declaration in writing of a desire to vest the ownership in the donee; *McCloskey v. Tierney*, 141 Cal. 101, 74 Pac. 699, 99 Am. St. Rep. 33 (1903), delivery was accompanied by an assignment in writing. But there is no necessity for a written assignment. *Bryant v. Abington Savings Bank*, 196 Mass. 254, 81 N. E. 997, 124 Am. St. Rep. 552 (1907).

The fact that enjoyment is postponed until the death of the donor or that interest is reserved is immaterial. *Jacobs v. Jolley*, 29 Ind. App. 25 (1901); *Goodrich's Ex'r v. Rutland Savings Bank supra*.

<sup>1a</sup> In such case there is evidence of a completed gift although the donor is allowed interest for life and the pass book is kept first in the box of the depositor, later in the box of the donee, and still later in the box of the depositor until he died, the order being always kept by the donee. *Bone v. Holmes*, 915 Mass. 495, 81 N. E. 290 (1907).

<sup>2</sup> *Foss v. Lowell Five Cents Savings Bank*, 111 Mass. 285.

<sup>3</sup> *Camp's Appeal*, 36 Conn. 88; *Brown v. Brown*, 18 Conn. 410.

<sup>3a</sup> *Mack v. Mechanics and Farmers' Savings Bank*, 50 Hun (N. Y.) 477.

the deposit to him, and it is accepted by him, there is a gift.<sup>4</sup> Some cases hold that delivery of the book must be actually and formally made, even when the donee is already in possession of it.<sup>5</sup> But other cases hold that, if the donee is already in possession, any clear declaration of intent, verbal or written, is sufficient to complete the gift.<sup>6</sup> In *Penfield v. Thayer*, just cited, the donor said, "My trunk and what there is in it I give to you; there is enough in it to take care of you for life," — and went away not expecting to return; but did in fact return, and occupied his room in the boarding-house where both donor and donee lived. Soon after, the donor died, and the donee took possession of his trunk, and found in it a bank-book, which she was held to have a right to keep.

A gift of a deposit in a savings bank, accompanied by a delivery of the book itself, and a check or order upon the bank for an amount less than that on deposit in the bank, is a valid gift of the amount of the check.<sup>7</sup>

A gift of a deposit in a savings bank accompanied by an order upon the bank to pay the donee, is a valid gift even though the book is lost and donor retains the use of the money during his life.<sup>8</sup>

§ 609. **Gift by Deposit in Name of Donee.** — A father made a deposit of his wife's money in the name of his daughter. The mother intended a gift, and though the daughter did not know

<sup>4</sup> *Sweeney v. Boston Five Cents Savings Bank*, 116 Mass. 384; *Matter of Crawford*, 113 N. Y. 560, 21 N. E. 692.

<sup>5</sup> *Shower v. Pileck*, 4 Ex. 477; *French v. Raymond*, 39 Vt. 623; *Cutting v. Gilman*, 41 N. H. 147.

<sup>6</sup> *Tenbrook v. Brown*, 17 Ind. 410; *Stevens v. Stevens*, 2 Hun (N. Y.) 470; *Southerland v. Southerland*, 5 Bush (Ky.) 591; *Wing v. Merchant*, 57 Me. 383; *Roberts v. Roberts*, 15 W. R. 117; *Providence Inst. v. Taft*, 14 R. I. 502; *Waring's Adm'r v. Edmonds*, 11 Md. 424; *Carradine v. Carradine*, 58 Miss. 286; *Winter v. Winter*, 101 Eng. C. L. 997; *Penfield v. Thayer*, 2 E. D. Smith (N. Y.) 305; *Jacobs v. Jolley*, 29 Ind. App. 25, 62 N. E. 1028 (1901); *Goodrich's Ex'r v. Rutland Savings Bank*, 81 Vt. 147, 69 Atl. 651, 17 L. R. A. (N. S.) 181, n. (1908).

Payment to donee after the death of the donor was held good in *McGuire v. Murphy*, 107 App. Div. 104 (1905), 94 N. Y. S. 1005.

Title may pass by a written assignment even though the bank is not notified until after the death of the donor. *Stacks v. Buten*, 141 Wis. 235, 124 N. W. 403, 135 Am. St. Rep. 39 (1910).

<sup>7</sup> *Wetherow v. Lord*, 41 App. D. (Hun, N. Y.) 413 (1899); *Hill v. Escort*, 38 Tex. Civ. App. 487, 86 S. W. 367 (1905); the check was for the full amount of the deposit and was not presented till after the donor's death. See *Jacobs v. Jolley*, 29 Ind. App. 25, 62 N. E. 1028 (1901).

<sup>8</sup> *Candee v. Connecticut Savings Bank*, 81 Conn. 372, 71 Atl. 551, 22 L. R. A. (N. S.) 568, n. (1908).

of it until after the father died, and he had pledged the bank-book for his debt, the judge said that *it was to be inferred* that an absolute gift was intended, which had not been revoked, and that *the daughter had accepted it*.<sup>1</sup> So where Adaline Brown deposited money in the name of another (B.) and kept the book, and B. died before Adaline, without ever knowing of the deposit in her name, yet it was held a good gift, and went into B.'s estate.<sup>2</sup>

It is well established that a gift may be made without delivery of the pass-book.<sup>3</sup> But some cases do not hold, as above, that the acceptance of the donee will be presumed, but say that the gift is not perfect until acceptance, which requires some mutual action of the parties, or act of one assented to by the other. Any act or speech, at any time before the gift is revoked, showing a mutual understanding that the gift is made, is sufficient; but *some* act is necessary.<sup>4</sup> A deposit in the name of the wife of the depositor,<sup>4a</sup> against which the wife drew checks thereby signifying her acceptance, is a good and complete gift, and the deposit cannot be applied to satisfy the overdraft of the depositor.<sup>5</sup>

Where A. makes a deposit, subject to the order of A. or his

<sup>1</sup> § 609. Kimball v. Norton, 59 N. H. 1.

Acceptance will ordinarily be presumed when the gift is entirely beneficial to the donee. Goelz v. People's Savings Bank, 31 Ind. App. 67, 67 N. E. 232 (1902).

<sup>2</sup> Howard v. Savings Bank, 40 Vt. 597.

But there is no gift when the depositor does not intend to make an absolute immediate gift even though the one in whose name it is deposited knows thereof. Hallowell Savings Inst. v. Titcomb, 96 Me. 62, 51 Atl. 249 (1901); and there is no gift when A. deposits her money in the name of A. or B. and retains the bank-book, but with intent to transfer the fund at her death. Bath Savings Institution v. Fogg, 101 Me. 188, 63 Atl. 731 (1906).

<sup>3</sup> Blasdel v. Locke, 52 N. H. 238; McElroy v. Albany Savings Bank, 8 N. Y. App. Div. 46; Smith v. Savings Bank, 64 N. H. 228, 9 Atl. 792; Goelz v. People's Savings Bank, 31 Ind. App. 67, 67 N. E. 232 (1902). See Succession of Zacharie, 119 La. 150, 43 So. 988 (1907), holding that where a bachelor caused money to be deposited in a savings bank to the credit of his dependent sisters living with him, the delivery to the bank was a delivery to the sisters and the gift was complete *eo instante*.

<sup>4</sup> Scott v. Berkshire County Savings Bank, 140 Mass. 157, 2 N. E. 925; Gerrish v. New Bedford Savings Institution, 128 Mass. 159; Bailey v. New Bedford Inst. for Savings, 192 Mass. 564, 78 N. E. 419, 116 Am. St. Rep. 270 (1906).

<sup>4a</sup> Money of a husband drawn by check from his account in a national bank, payable to a savings bank and deposited in his wife's individual name does not necessarily show a gift. Dodge v. Lunt, 181 Mass. 320, 63 N. E. 891 (1902).

<sup>5</sup> People v. State Bank, 36 Hun (N. Y.) 607.

wife, the balance, upon the death of either, to belong to the survivor, and the deposit remains undisturbed till the death of A., the bank is justified in paying the balance to the wife. There was no testamentary element in the case. It was a present equitable assignment.<sup>6</sup>

But when a joint account is opened in the name of a husband and wife on which each has the right to draw and the deposits are from his separate estate there is no gift to the wife of a half interest in the deposits.<sup>7</sup> But the presumption is that he intended to create the right of survivorship.<sup>8</sup> If he delivers the bank-book to her and she accepts the same and draws checks against the account there is an irrevocable gift.<sup>9</sup>

If a wife deposits money in a bank and makes it subject to her order or the order of her husband or the survivor of them there is no completed gift even though the husband makes occasional deposits and has the bank-book when depositing the money and once or twice when drawing money for her. But he has a right to the balance remaining at her death.<sup>10</sup>

When A. and his wife B. make a deposit in the name of their children and the entry in the bank-book is signed "Mr. and Mrs. A., payable at our death to above children" there is a trust created in favor of the children which cannot be revoked.<sup>11</sup>

When a deposit is in the form of "M. or S. payable to either and to the survivor" and both parties sign the bank-book there is a joint tenancy and the survivor is entitled to the whole.<sup>12</sup> But if M. who makes the deposit retains the bank-book there is neither a perfect gift nor a trust, and the balance upon the death of M. should be paid to his administrator.<sup>13</sup> And if S. makes no deposit to the account and has never had or demanded possession of the

<sup>6</sup> *Metropolitan Savings Bank v. Murphy*, 82 Md. 314, 33 Atl. 640.

<sup>7</sup> *Meyers v. Albert*, 76 Wash. 218, 135 Pac. 1003 (1913); *Slee v. Kings County Saving Institution*, 78 App. Div. 534 (1903), 79 N. Y. S. 630; *Schneider v. Schneider*, 122 App. Div. 774 (1907), 107 N. Y. S. 792.

<sup>8</sup> *Corcoran v. Hotelling*, 164 App. Div. 75 (1914), 148 N. Y. S. 302; *West v. McCullough*, 123 App. Div. 846 (1908), 108 N. Y. S. 493, affirmed in 194 N. Y. 518, 87 N. E. 1130.

<sup>9</sup> *In re Holmes*, 79 App. Div. 264 (1903), 79 N. Y. S. 592.

<sup>10</sup> *Colmary v. Fanning*, 124 Md. 548, 92 Atl. 1045 (1915).

<sup>11</sup> *Baker v. Baker*, 123 Md. 32, 90 Atl. 776 (1914).

<sup>12</sup> *Bonnette v. Seone*, 153 App. Div. 73 (1912), 138 N. Y. S. 67; *Clary v. Fitzgerald*, 155 App. Div. 659 (1913), 140 N. Y. S. 536; *O'Connor v. Dunnigan*, 158 App. Div. 334 (1913), 143 N. Y. S. 373.

<sup>13</sup> *Mathias v. Fowler*, 124 Md. 655, 93 Atl. 298 (1915).

bank-book the intention of M. in making the deposit in that form seems to be immaterial.<sup>14</sup>

When a mother changed the deposit in her name to "A. or son F." and later delivered the book to C. with directions to keep the same for F. and deliver it to him when he came back, there is evidence of intent to invest the son with joint ownership and the son surviving the mother is entitled to the whole.<sup>15</sup> The same is true when an aunt changes her account so as to stand in her name or that of her niece,<sup>16</sup> or when an employee adds the name of her employer.<sup>17</sup> But the intent to make the gift is a question of fact to be determined by the jury.<sup>18</sup>

When A. makes a deposit "in trust for herself A. and her granddaughter M. joint owners subject to the order of either, the balance at the death of either to belong to the survivor" M. is entitled to the money upon the death of A.<sup>19</sup>

**§ 609 A. Gift by Indorsement and Delivery of Check.** — The indorsement by the donee of a check payable to order and the delivery thereof constitute a valid gift of the fund represented by such check.<sup>1</sup>

When a check upon a bank is delivered to the payee but not presented to the bank till after the death of the maker it is collectible from the maker's estate if based upon a valid and sufficient consideration.<sup>2</sup>

**§ 610. Gift Inter Vivos by Declaration of Trust.** — *No notice necessary, nor delivery of the bank-book.* — D. told her banker to put \$2000 in the joint names of N. and W., and of herself as trustee for N. and W. This being done, the trust was held to be complete, though no notice was given to the donees.<sup>1</sup> In the case of

<sup>14</sup> *Graffing v. Irving Savings Bank*, 69 App. Div. 566 (1902), 74 N. Y. S. 741.

<sup>15</sup> *Farrelly v. Emigrant Sav. Bank*, 92 App. Div. 529 (1904), 87 N. Y. S. 54; affirmed in 179 N. Y. 594, 72 N. E. 1141.

<sup>16</sup> *Hallenbeck v. Hallenbeck*, 103 App. Div. 107 (1905), 93 N. Y. S. 73; *Kelly v. Albany Trust Co.*, 124 App. Div. 99 (1908), 108 N. Y. S. 214.

<sup>17</sup> *Mann v. Shrine*, 111 App. Div. 452 (1906), 97 N. Y. S. 688.

<sup>18</sup> *Kelly v. Home Savings Bank*, 103 App. Div. 141 (1905), 92 N. Y. S. 578.

<sup>19</sup> *Mulfinger v. Mulfinger*, 114 Md. 463, 79 Atl. 1089 (1911).

<sup>1</sup> § 609 A. *Succession of Desina*, 123 La. 468, 49 So. 23 (1909).

<sup>2</sup> *Clay v. Layton*, 134 Mich. 317, 96 N. W. 458 (1903).

<sup>1</sup> § 610. *Wheatley v. Purr*, 1 Keen 551. But a deposit in the name of "D. in trust for C." does not create a trust when there is no intent to do so. *Cleveland v. Hampden Savings Bank*, 182 Mass. 110, 65 N. E. 27 (1902); *Kelley v. Snow*, 185 Mass. 288, 70 N. E. 89 (1904); *In re Barefield*, 82



personal property, no form of words is necessary to create a trust; it is sufficient if the owner transfers to a third person in trust, or declares orally or in writing, that he himself holds *in præsentia* as trustee for another.<sup>1a</sup> B. made deposits in trust for two sisters; neither of them knew of the transaction, and B. retained the pass-book till her death; yet it was held a good gift by trust, the court saying that a gift could be made by transferring the property to a trustee for the purposes of the trust, or by declaring that it is held by the donor in trust for those purposes. It is the natural and proper thing for a trustee to retain the book given him as trustee; and a trust, if unequivocally created, cannot be affected by retention of the instrument of trust, especially where the retainer is himself the trustee. It is a question of fact whether he holds the book for himself or as trustee.<sup>2</sup>

App. Div. 463, 81 N. Y. S. 843 (1903); *Marsh v. Keogh*, 82 App. Div. 503, 81 N. Y. S. 825 (1903); *Jenkins v. Baker*, 77 App. Div. 509, 78 N. Y. S. 1074 (1902).

<sup>1a</sup> *Buckingham's Appeal*, 60 Conn. 143, 22 Atl. 509; *McMahon v. Lawler*, 190 Mass. 343, 77 N. E. 489 (1906).

In Massachusetts the trust is not completed until it is communicated to the donee or to one acting in trust for him and for his benefit and accepted by him. *Supple v. Suffolk Savings Bank*, 198 Mass. 393, 83 N. E. 432, 126 Am. St. Rep. 451 (1908).

<sup>2</sup> *Ray v. Simmons*, 11 R. I. 266; *Penfold v. Mould*, L. R. 4 Eq. 562; *Fletcher v. Fletcher*, 4 Hare 67; *McFadden v. Jenkyns*, 1 Hare 458; *Martin v. Funk*, 75 N. Y. 134; *Ex parte Pye*, 18 Ves. Jr. 140; *Milroy v. Lord*, 4 DeG. F. & J. 264; *Richardson v. Richardson*, L. R. 3 Eq. 686; *Mabie v. Bailey*, 95 N. Y. 206; *Anderson v. Thomson*, 38 Hun (N. Y.) 394; *Kekewich v. Manning*, 1 DeG. M. & G. 176; *Exton v. Scott*, 6 Sim. 31; *Morgan v. Malleson*, L. R. 10 Eq. 475; *Barker v. Frye*, 75 Me. 29; *Thorpe v. Owen*, 5 Beav. 224; *Scott v. Berkshire County Savings Bank*, 140 Mass. 157, 2 N. E. 925; *Murray v. Cannon*, 41 Md. 466; *Carson's Adm'r v. Phelps*, 40 Md. 73; *Gardner v. Merritt*, 32 Md. 78; *Smith v. Lee*, 2 Th. & C. (N. Y.) 291; *Hayden v. Hayden*, 142 Mass. 448, 8 N. E. 437; *Ide v. Pierce*, 134 Mass. 260; *Millsbaugh v. Putnam*, 16 Abb. Pr. (N. Y.) 380; *Souverybye v. Arden*, 1 Johns. Ch. (N. Y.) 240; *Bunn v. Winthrop*, 1 *id.*, 329; *Witzel's Case*, 3 Bradf. (N. Y.) 386, *cestui* no notice; *Blasdel v. Locke*, 52 N. H. 238, *cestui* had notice; *Sayre v. Weil*, 94 Ala. 466, 10 So. 546; *Macy v. Williams*, 83 Hun (N. Y.) 243; *Gaffney's Estate*, 146 Pa. St. 49, 23 Atl. 163; *Hyde v. Kitchen*, 69 Hun (N. Y.) 280; *Hallowell Savings Inst. v. Titcomb*, 96 Me. 62, 51 Atl. 249 (1901); *McMahon v. Lawler*, 190 Mass. 343, 77 N. E. 489 (1906); *In re Barefield*, 82 App. Div. 463 (1903), 81 N. Y. S. 843; *In re Totten*, 89 App. Div. 368 (1903), 85 N. Y. S. 928.

A deposit by the owner of money in his name as trustee for another does not create an irrevocable trust during the lifetime of the depositor, but simply a tentative trust revocable at will until the depositor completes the gift in his lifetime by some unequivocal act or declaration. *In re Totten*, 179 N. Y. 112, 71 N. E. 748, 70 L. R. A. 711 (1904); *In re Bulwinkle*,

And where a deposit was credited to "M. D., trustee of William", and M. D. told William's father what was done, but nevertheless drew the deposit herself, William recovered the amount from her administrator.<sup>3</sup>

An account was opened in a savings bank in the name of "E. C. M., in trust for G. F. M.", and the depositor, E. C. M., afterward made several deposits, and up to the time of her death withdrew all interest moneys. The bank-book was found among her assets after her death. Prior to the death of E. C. M., G. F. M. died. *Held*, that the bank was justified in paying the deposit to the representative of G. F. M., the presumption, which was not rebutted, being that an account was created in favor of G. F. M.<sup>3a</sup>

The mere fact that a depositor who deposits in trust for another thereafter makes deposits in and withdraws from the account does not disprove a trust.<sup>3b</sup>

*Retaining Book and Giving No Notice is Evidence of Intent not to Complete Gift*

Some cases hold that, as the rules of a savings bank require production of the book by one who claims the deposit, it is evi- 107 App. Div. 331 (1905), 95 N. Y. S. 176; *Garvey v. Clifford*, 114 App. Div. 193 (1906), 99 N. Y. S. 555; *Tierney v. Fitzpatrick*, 122 App. Div. 623 (1907), 107 N. Y. S. 527; *Lattan v. Van Ness*, 107 App. Div. 393 (1905), 95 N. Y. S. 97. A withdrawal of the deposit is a decisive act of disaffirmance. *Tierney v. Fitzpatrick*, *supra*. If the depositor delivered the pass-book to the beneficiary the trust becomes irrevocable. *In re Davis*, 119 App. Div. 35 (1907), 103 N. Y. S. 946. But if the depositor dies before the beneficiary without disaffirmance or revocation the presumption arises that an absolute trust was created as to the amount on hand when the depositor died. *In re Totten*, *supra*; *In re Bulwinkle*, *supra*. *Cuff v. Cuff*, 120 App. Div. 225 (1907), 105 N. Y. S. 332. And if the beneficiary dies before the donor the trust is *ipso facto* terminated. *In re United States Trust Co.*, 117 App. Div. 178 (1907), 102 N. Y. S. 271.

<sup>3</sup> *Minor v. Rogers*, 40 Conn. 512; *Scott v. Harbeck*, 39 Hun (N. Y.) 292.

<sup>3a</sup> *Bishop v. Seaman's Bank for Savings*, 33 App. Div. (Hun, N. Y.) 181 (1898). See *Leonard v. Leonard*, 181 Mass. 458, 63 N. E. 1068, 92 Am. St. Rep. 426 (1902), holding that such deposit or transfer from another account may be illusory.

<sup>3b</sup> *Proseus v. Potter*, 20 App. Div. (Hun, N. Y.) 44 (1897). The intention of the depositor governs. *Rambo v. Pile*, 220 Pa. St. 235, 69 Atl. 807 (1908).

In New Jersey a deposit by C. in her own name as trustee for F. without notifying anyone of the deposit and a retention of the pass-book is neither a gift *inter vivos* nor a trust *inter vivos*. Nor is there a trust when the deposit is in the name of the depositor in trust for a certain person who is dead at the time. *Nicklas v. Parker*, 69 N. J. Eq. 743, 61 Atl. 267 (1905); *id.*, 71 N. J. Eq. 777, 71 Atl. 1135 (1906).

dence of intent not to perfect the gift if the donor trustee retains the book, and does not communicate the fact of the trust to the donee. If the donee is neither a party nor privy to the transaction, the trust is executory if the trustee retains possession, title, and power of disposing of the property.<sup>4</sup> A depositor will not be allowed to violate or evade the law limiting the amount of deposit to one name, by making a trust deposit, and giving no notice to the donee.<sup>5</sup> In such cases, it would seem the quickest way to enforce the law to uphold the trust as valid.

Extraneous evidence is admissible as to the intent of the donor. His declarations and acts, while holding the trust, are competent to show the real character of the transaction.<sup>5a</sup> A deposit "in trust" is not conclusive evidence of a trust, if surrounding circumstances repel the presumption that the donor intended to part with the property.<sup>6</sup>

<sup>4</sup> *Stone v. Bishop*, 4 Cliff. 593; *Armstrong v. Timperon*, 24 Law T. n. s. 275; and see *Clark v. Clark*, 108 Mass. 522; *Bartlett v. Remington*, 59 N. H. 364; *Id v. Pierce*, 134 Mass. 262; *Gardner v. Merritt*, 32 Md. 78; *Broderick v. Waltham Savings Bank*, 109 Mass. 149; *Kilpin v. Kilpin*, 1 My. & K. 520; *Brabrook v. Boston Five Cents Savings Bank*, 104 Mass. 228; *Pierce v. Boston Five Cents Savings Bank*, 129 Mass. 425; *Vanderberg v. Palmer*, 4 Kay & Johns. 204; *Cunningham v. Davenport*, 147 N. Y. 43, 41 N. E. 412; *Beaver v. Beaver*, 137 N. Y. 59, 32 N. E. 998; *Norway Savings Bank v. Merriman*, 88 Me. 146, 33 Atl. 840; *Hemerich v. Union Dime Sav. Inst.*, 205 N. Y. 366, 98 N. E. 499, 1913E Ann. Cas. 514, n.; *In re Totten*, 179 N. Y. 112, 71 N. E. 748, 70 L. R. A. 711 (1904); *Hessen v. McKinley*, 155 App. Div. 496 (1913), 140 N. Y. S. 724; *Nicklas v. Parker*, 69 N. J. Eq. 743, 61 Atl. 267 (1905); *id.*, 71 N. J. Eq. 777, 71 Atl. 1135 (1906).

<sup>5</sup> See *Brabrook v. Boston Five Cents Savings Bank*, 104 Mass. 228.

<sup>5a</sup> *Grafiug v. Heilmann*, 1 N. Y. App. Div. 260; *Haux v. Dry Dock Savings Institution*, 2 N. Y. App. Div. 165; *Citizens' National Bank v. McKenna*, 168 Mo. App. 254, 153 S. W. 521 (1913).

<sup>6</sup> *Bartlett v. Remington*, 59 N. H. 364; *Ray v. Simmons*, 11 R. I. 266; *Hill v. Stevenson*, 63 Me. 364; *Minor v. Rogers*, 40 Conn. 512; *Gerrish v. New Bedford Savings Institution*, 128 Mass. 159; *Scott v. Berkshire County Savings Bank*, 140 Mass. 157, 2 N. E. 925; *Weber v. Weber*, 9 Daly (N. Y.) 211; *Mabie v. Bailey*, 95 N. Y. 206, 210; *Bath Savings Institution v. Hathorn*, 88 Me. 122, 33 Atl. 836; *O'Brien v. Weiler*, 68 Hun (N. Y.) 64; *Citizens' National Bank v. McKenna*, 168 Mo. App. 254, 153 S. W. 521 (1913); *Coolidge v. Knight*, 194 Mass. 546, 80 N. E. 620, 120 Am. St. Rep. 573 (1907).

Whether a depositor who draws an order directing the bank to pay the deposit and dividends to another makes a gift to such person is dependent upon the question of intent. *Williams v. Moulton*, 186 Mass. 402, 71 N. E. 808 (1904).

When a deposit is made "in trust for son John" the attempted trust is in favor of the depositor if it is shown that she never had any children. *Washington v. Bank for Savings*, 65 App. Div. 338 (1901), 72 N. Y. S. 752.

If the donee is notified of the deposit and the pass-book is delivered to him, the trust is irrevocable.<sup>6a</sup>

A gift *inter vivos* is not revoked by the death of the donor.<sup>7</sup>

### § 611. Donatio Causa Mortis in General

1st. A gift *causa mortis* must be made in contemplation of the near approach of death, from present illness or apprehended peril,<sup>1</sup> which must be something more certain than the vague apprehension of a soldier going into war.<sup>2</sup>

2d. The donor must die of some present sickness or peril;<sup>3</sup> otherwise, if the donor recovers, the gift is revoked,<sup>4</sup> as it may be also by the declared will of the donor at any time before his death., There is no specific limit of time within which the donor must die<sup>5</sup> in order to make the gift valid.<sup>6a</sup>

3d. The intent must be that the gift shall take effect only

If the depositor before making a deposit in her name in trust for another declares it to be her intention that the account and money should be for the benefit of the other an irrevocable trust is created. *O'Brien v. Williamsburg Saving Bank*, 101 App. Div. 108 (1905), 91 N. Y. S. 908.

The deposit by one person of his money in the name of a second person in trust for a third person accompanied by the delivery of the pass-book to the trustee does not conclusively establish an irrevocable trust. *Lattan v. Van Ness*, 107 App. Div. 393 (1905), 95 N. Y. S. 97.

<sup>6a</sup> *Matthews v. Brooklyn Sav. Bank*, 151 App. Div. 527 (1912), 136 N. Y. S. 110; *Stocket v. Dry Dock Savings Inst.*, 155 App. Div. 123 (1913), 139 N. Y. S. 968; *Robinson v. Appleby*, 69 App. Div. 509 (1902), 75 N. Y. S. 1; *Hutton v. Smith*, 74 App. Div. 284 (1902), 77 N. Y. S. 523.

<sup>7</sup> *Martin v. McCullough*, 136 Ind. 331, 34 N. E. 819; *First National Bank v. O'Byrne*, 177 Ill. App. 473 (1913).

<sup>1</sup> § 611. See on the general requisites, 2 Kent 444; *Kenistons v. Seeva*, 54 N. H. 37; *Grymes v. Hone*, 49 N. Y. 17; *Raymond v. Sellick*, 10 Conn. 484; *Michener v. Dale*, 23 Pa. St. 59; *Edwards v. Jones*, 1 My. & Cr. 233; *Miller v. Miller*, 3 P. Wms. 356. It is presumed to be in contemplation of death if in last illness. *Tygard v. McComb*, 54 Mo. App. 85.

<sup>2</sup> *Irish v. Nutting*, 47 Barb. (N. Y.) 370; *Gourley v. Linsenbigler*, 41 Pa. St. 345; *Smith v. Dorsey*, 38 Ind. 451; *Daniel v. Smith*, 75 Cal. 549, 17 Pac. 683.

<sup>3</sup> *Weston v. Hight*, 17 Me. 287; *Larrabee v. Hascall*, 88 Me. 511, 34 Atl. 408; *Ridden v. Thrall*, 125 N. Y. 572, 26 N. E. 627; *O'Brien v. Elmira Savings Bank*, 99 App. Div. 76 (1904), 91 N. Y. S. 364; *First National Bank v. O'Byrne*, 177 Ill. App. 473 (1913).

<sup>4</sup> *Weston v. Hight*, 17 Me. 287; *Parker v. Marston*, 27 Me. 196; *Staniland v. Willott*, 3 Mac. & G. 664. But see *Nicholas v. Adams*, 2 Whart. 17 (Pa.), and *Irish v. Nutting*, 47 Barb. (N. Y.) 370.

<sup>5</sup> *Merchant v. Merchant*, 2 Bradf. (N. Y.) 432; *Bunn v. Markham*, 7 Taunt. 224; *Doran v. Doran*, 99 Cal. 311, 33 Pac. 929.

<sup>6a</sup> *Larrabee v. Hascall*, 88 Me. 511, 34 Atl. 408; *Williams v. Guile*, 117 N. Y. 343, 22 N. E. 1071.

upon the death of the donor <sup>6</sup> (otherwise it may be a gift, but not a *donatio causa mortis*), and if the donee die before the donor, the gift never takes effect.<sup>7</sup>

4th. There must be a delivery by the donor, or by some one at his order,<sup>8</sup> to the donee or to some third person for the donee;<sup>9</sup> and this delivery must be during the life of the donor, though the delivery by the third person to the donee may be after the donor's death.<sup>10</sup> Constructive delivery, as of the key of a trunk or cupboard in which valuable articles are kept, has been in some cases held sufficient,<sup>11</sup> in others not.<sup>12</sup> Control, or the emblem of it, should pass from the donor. An English case holds that delivery of a check not presented before the maker's death is a good gift *causa mortis*.<sup>12a</sup> The same is true in Minnesota.<sup>12b</sup> But in California if the check is without consideration and the payee is directed not to present it till after the death of the drawer there is no gift and no assignment of the fund.<sup>12c</sup>

In Georgia a check which has been given by a donor as a means

<sup>6</sup> *Tate v. Hilbert*, 2 Ves. Jr. 111. If the gift is in contemplation of death, this condition is implied unless circumstances indicate an intent to make an irrevocable gift *inter vivos*. *Rhodes v. Childs*, 64 Pa. St. 18; *Edwards v. Jones*, 1 Myl. & Cr. 226; *Guinan's Appeal*, 70 Conn. 342, 39 Atl. 482.

<sup>7</sup> *Wells v. Tucker*, 3 Binn. (Pa.) 366; *Merchant v. Merchant*, 2 Bradf. (N. Y.) 432.

<sup>8</sup> *Hunt v. Hunt*, 119 Mass. 474; *Case v. Dennison*, 9 R. I. 88; *First National Bank v. O'Byrne*, 177 Ill. App. 473 (1913).

<sup>9</sup> *Wells v. Tucker*, 3 Binn. (Pa.) 366; *Clough v. Clough*, 117 Mass. 83; *Dresser v. Dresser*, 46 Me. 48; *Sessions v. Moseley*, 4 Cush. (Mass.) 87; *Tomlinson v. Ellison*, 104 Mo. 105, 16 S. W. 201; *Drew v. Hagerty*, 81 Me. 231, 17 Atl. 63; *O'Brien v. Elmira Savings Bank*, 99 App. Div. 76 (1904), 91 N. Y. S. 364; *First National Bank v. O'Byrne*, 177 Ill. App. 473 (1913); *Stratton v. Athol Savings Bank*, 213 Mass. 46, 99 N. E. 454 (1912).

<sup>10</sup> *Sessions v. Moseley*, 4 Cush. (Mass.) 87.

<sup>11</sup> *Jones v. Brown*, 34 N. H. 439; *Cooper v. Burr*, 45 Barb. (N. Y.) 9; *Ward v. Turner*, 2 Ves. Sen. 443; *Coleman v. Parker*, 114 Mass. 30, *dictum*; *Goulding v. Horbury*, 85 Me. 227, 27 Atl. 127; *Debinson v. Emmons*, 158 Mass. 592, 33 N. E. 706. See *Day v. Richards*, 197 Mass. 86, 83 N. E. 324 (1907), where there was a delivery of four keys, one of which was a key to a shop, another a key to a trunk in the shop in which was a bank-book. The question of delivery was not passed upon as the evidence did not show an intent to deliver the book.

<sup>12</sup> *Hatch v. Atkinson*, 56 Me. 324.

<sup>12a</sup> *Duffin v. Duffin*, 44 Ch. D. 76.

<sup>12b</sup> *Varley v. Sims*, 100 Minn. 331, 111 N. W. 269, 117 Am. St. Rep. 694, 8 L. R. A. (N. S.) 828 (1907).

<sup>12c</sup> *Pullen v. Placer County Bank*, 138 Cal. 169, 66 Pac. 740, 94 Am. St. Rep. 19 (1901).

of paying a certificate of deposit that has been given *causa mortis* is not revoked because of failure to present it till after the death of the donor.<sup>12d</sup>

5th. The donee must accept.<sup>13</sup>

6th. The gift may be coupled with a trust.<sup>14</sup>

7th. It cannot avail against creditors if they would be prejudiced by sustaining it, as where the assets are insufficient to pay them.<sup>15</sup>

8th. Gifts *causa mortis* are not favored by the law, because they open the door to the very frauds and impositions upon dying persons which the formalities of will-making are framed to prevent.<sup>16</sup> But as the spirit of fraud may lurk in any transaction, and as in some cases great injustice might be done by refusing to allow a transfer otherwise than by will, it seems best to uphold such gifts, remembering, however, that they offer peculiar opportunities for imposition, and should therefore be clearly and satisfactorily proved by sufficiently disinterested evidence to overcome their naturally suspicious character.<sup>17</sup> There is no presumption against them. It is only necessary that the proof be clear and convincing.<sup>17a</sup> And when these requirements are complied with there seems no just cause to refuse to enforce such a gift, because another case may involve fraud, than to refuse to allow a man to spend his money or to eat because another may be a spendthrift or a glutton. The good and the bad should not be put under the same prohibition, unless it is impossible to distinguish them. At any rate, it does not seem consistent to hold that a man may pass the interest in his property by saying, "I hold this in trust for you," and then to hold that, although a donor says, "I want you to have the money in my trousers pocket hanging

<sup>12d</sup> Philpot v. Temple Banking Co., 2 Ga. App. 742, 60 S. E. 480 (1907).

<sup>13</sup> Delmotte v. Taylor, 1 Redf. (N. Y.) 417.

<sup>14</sup> Curtis v. Portland Savings Bank, 77 Me. 151; Hills v. Hills, 8 M. & W. 401; Board of Missions v. Mechanics' Savings Bank, 40 App. Div. (Hun, N. Y.) 120 (1899); Loueks v. Johnson, 70 Hun (N. Y.) 565.

<sup>15</sup> Chase v. Redding, 13 Gray (Mass.) 418; Michener v. Dale, 23 Pa. St. 59; Borneman v. Sidlinger, 15 Me. 429; Bloomer v. Bloomer, 2 Bradf. (N. Y.) 339; Seybold v. Bank, 5 N. D. 460; Basket v. Hassell, 107 U. S. 602, 27 L. ed. 500, 2 Sup. Ct. 415.

<sup>16</sup> Hatch v. Atkinson, 56 Me. 324; Holley v. Adams, 16 Vt. 206; Delmotte v. Taylor, 1 Redf. (N. Y.) 417.

<sup>17</sup> Ellis v. Secor, 31 Mich. 185; Citizens' Savings Bank v. Mitchell, 18 R. I. 739, 30 Atl. 626.

<sup>17a</sup> Lewis v. Merritt, 113 N. Y. 386, 21 N. E. 141; Vaudor v. Roach, 73 Cal. 614, 15 Pac. 354; Devlin v. Greenwich Savings Bank, 125 N. Y. 756, 26 N. E. 744.

in that closet, and E. (who owned the house and was present) will give it to you," and E. did so, after the donor's death, yet there was no gift. (§ 615 *d.*) Nor does it seem altogether sensible to rule that "impossibility excuses all things", — that necessity will justify omission of presentment and notice in respect to negotiable paper, or trespass on another's land, or tearing down his house, or even taking life, and yet that it will not justify omission to deliver a bank-book, however clear the evidence of a wish that the donee should have it, though from the circumstances it was also impossible to make a proper will. The language of the cases is broad enough to cover even such a combination of facts.

§ 612. **Gift of Deposit Causa Mortis.** — Some cases hold that a delivery of the bank-book, with or without an assignment, with intent that the transfershall take effect as a gift of the deposit upon the death of the donor from his existing illness, is a *donatio causa mortis*.<sup>0</sup> Or the delivery may be to a third person for the donee,<sup>1</sup> and coupling the gift with a trust to bury the donor does not invalidate it.<sup>2</sup>

The above propositions are applicable to savings banks only, as the delivery of the pass-book of an ordinary bank is not a *donatio causa mortis*.<sup>2a</sup>

Delivery of the book is absolutely necessary to this form of gift, and the fact that it is beyond the power of the owner wishing to make the gift does not avail to excuse non-delivery, or make the

<sup>0</sup> § 612. The indorsement and delivery of an instrument in writing given by a savings bank acknowledging the receipt of a draft on a foreign bank for collection is a good gift of the draft or its proceeds. *Cronin v. Chelsea Savings Bank*, 201 Mass. 146, 87 N. E. 484 (1909).

A delivery of a bank-book with the statement "If I die bury me out of this and what is left is yours" is a good gift *causa mortis*. *Mahon v. Dime Savings Bank*, 92 App. Div. 506 (1904), 87 N. Y. S. 258.

<sup>1</sup> *Pierce v. Boston Five Cents Savings Bank*, 129 Mass. 425; *Tillinghast v. Wheaton*, 8 R. I. 536; *Curtis v. Portland Savings Bank*, 77 Me. 151. See *Kingman v. Perkins*, 105 Mass. 111; *Kimball v. Leland*, 110 Mass. 325; *Foss v. Lowell Five Cents Savings Bank*, 111 Mass. 285; *Sheedy v. Roach*, 124 Mass. 472; *Davis v. Ney*, 125 Mass. 590; *First National Bank v. O'Byrne*, 177 Ill. App. 473 (1913); *Varley v. Sims*, 100 Minn. 331, 111 N. W. 269, 117 Am. St. Rep. 694, 8 L. R. A. (N. S.) 828 (1907).

<sup>2</sup> *Curtis v. Portland Savings Bank*, 77 Me. 151; and see *Clough v. Clough*, 117 Mass. 83; *Hills v. Hills*, 8 Mees. & Wels. 401; *Jones v. Weakley*, 99 Ala. 441, 12 So. 420.

<sup>2a</sup> *Jones v. Weakley*, 99 Ala. 441, 12 So. 420; *Walsh's Appeal*, 122 Pa. St. 177, 15 Atl. 470; *Thomas' Adm'r v. Lewis et als.*, 89 Va. 1, 15 S. E. 389.

gift complete without it.<sup>3</sup> The person *in extremis* must designate the gift and the donee, and must show intent that the property is to pass presently, and the intent must be carried out by actual delivery; and it has been said that delivery to an agent to deliver to the donee at the donor's death is not sufficient.<sup>4</sup> This seems to conflict with the law as laid down by Judge Foster,<sup>5</sup> who says that a donation is a gift conditioned to take effect on the death of the donor from his existing illness, and the reason of the matter seems against the Arkansas case, for the donor can give or transfer his property during life, subject to such conditions as he may see fit within the perpetuity limit. He could give A. property to be given to D. upon D.'s coming of age, or he could transfer the property to A. in trust for D. in any manner he saw fit. What solid reason can be given for distinguishing a transfer to A. to give to D. on the death of the donor? If it is said that the formalities of the wills act must be gone through with in order to prevent fraud, then be consistent and refuse to allow any *donatio causa mortis*, but do not distinguish where there is no difference.<sup>6</sup>

Moreover, the uniform holding of the courts is that the title does not vest in the donee *causa mortis* until death of the donor.<sup>7</sup> If he recovers from the particular illness in which he made the delivery, the gift fails, even though he should die afterward of the same disease.<sup>8</sup> And it has been distinctly held that a *donatio causa mortis* differs from a gift *inter vivos* in respect to revocation of an agent's authority by death of the principal; for in the former, though the thing is not delivered by the agent to or accepted by the donee till after the death of the donor, it is sufficient.<sup>9</sup>

### No Gift

§ 613. **No Intent.** — Where H. gave her husband a check drawn by her payable to P., and the husband represented that H. intended him to have the money, whereupon P. cashed it for him,

<sup>3</sup> French v. Raymond, 39 Vt. 623; Case v. Dennison, 9 R. I. 88; Drew v. Hagerty, 81 Me. 231, 17 Atl. 63.

<sup>4</sup> Newton v. Snyder, 44 Ark. 42.

<sup>5</sup> Kenistons v. Sceva, 54 N. H. 37.

<sup>6</sup> See Holley v. Adams, 16 Vt. 206.

<sup>7</sup> Doty v. Willson, 47 N. Y. 580; Sessions v. Moseley, 4 Cush. (Mass.) 92; Tate v. Hilbert, 2 Ves. Jr. 111; Rhodes v. Childs, 64 Pa. St. 18; Parker v. Marston, 27 Me. 196.

<sup>8</sup> Weston v. Hight, 17 Me. 287.

<sup>9</sup> Sessions v. Moseley, 4 Cush. (Mass.) 87.



whereas H. intended P. to draw the money and retain it for her, as the mere delivery of the check to the husband should not have been relied upon by P. as sufficient evidence that the husband was meant to have the money (for in that case it would have been much simpler to draw the check in favor of the husband), H. recovered from P.<sup>1</sup>

If a husband who for several years kept an account in a national bank, in his own name, deposits therewith, with her consent, money belonging to his wife, who keeps no bank account in her own name, and there is no evidence that any of the money thus deposited by him was ever his property, the inference is that his wife intended neither to give nor loan the money so deposited.<sup>2</sup>

To establish a valid gift, the evidence must show a delivery of the property, with intent, on the part of the donor, to divest himself of title and possession, and must be inconsistent with any other intention.<sup>3</sup>

But declarations of the grantor after delivery of possession of the bank-book is inadmissible and ineffective for the purpose of defeating the claim.<sup>4</sup>

§ 614. **Testamentary Intent.** — Where the intent of a donor in declaring a gift or trust is shown to be to retain control of the fund during his life, the property to pass from his control to that of the donee only at his death, it is in the nature of a testamentary disposition of property, and will not be sustained unless the formalities of the wills act are conformed to, except the case comes within the principle of a *donatio causa mortis*. For example, A. made a deposit "in trust", notifying the donees, and telling them that he (A.) would control the money while he lived, but at his death it would be theirs. This was not a completed gift.<sup>1</sup> So where a

<sup>1</sup> § 613. *Hunt v. Poole*, 139 Mass. 224, 30 N. E. 90.

<sup>2</sup> *Springfield Institution for Savings v. Copeland*, 160 Mass. 380, 35 N. E. 1132.

<sup>3</sup> *Matter of Bolin*, 136 N. Y. 177, 32 N. E. 626; *Nogga v. Savings Bank*, 79 Conn. 425, 65 Atl. 129 (1906); *Schneider v. Schneider*, 122 App. Div. 774 (1907), 107 N. Y. S. 792; *Tyrrel v. Emigrant Industrial Sav. Bank*, 77 App. Div. 131 (1902), 79 N. Y. S. 49; *Slee v. Kings County Sav. Inst.*, 78 App. Div. 534 (1903), 79 N. Y. S. 630.

<sup>4</sup> *Scheps v. Bowery Sav. Bank*, 97 App. Div. 434 (1904), 90 N. Y. S. 26; *Kelly v. Home Savings Bank*, 103 App. Div. 141 (1905), 92 N. Y. S. 578.

<sup>1</sup> § 614. *Nutt v. Morse*, 142 Mass. 1, 6 N. E. 763; *Providence Institution for Savings v. Carpenter*, 18 R. I. 287, 27 Atl. 337; *Weatherbee v. Litchfield*, 186 Mass. 399, 71 N. E. 796 (1904). See *Nicklas v. Parker*, 69 N. J. Eq. 743, 61 Atl. 267 (1905); *id.*, 71 N. J. Eq. 777, 71 Atl. 1135.

deposit by R. was "to be drawn by R. after her death by F."<sup>2</sup> And again, where a deposit was in the name of "J. B., order of A. B.", and on the last page of the book was written, "At my decease pay J. B. what may be due," and other deposits were made and money drawn by A. B. after this was written, there was no gift.<sup>3</sup>

A. deposited money in a savings bank in his own name, "payable also to B. in case of death of A." It did not appear that the alleged gift was made during the illness or peril of the donor, and it was not therefore good as a *donatio causa mortis*.<sup>4</sup>

A letter from D. to B. enclosing certificates of deposit, and directing B. to send the interest when due to D., if alive, if not, to R., and to get a new certificate at a future time in the name of D., if alive, and if not, then in the name of R., is testamentary and, therefore, no gift.<sup>5</sup> A bank-book was given by A. to C. to be held in trust for D., and if D. should die, to be given to E. D. No language of gift was used. *Held*, that the transaction was a testamentary disposition and was not a good gift *causa mortis*.<sup>6</sup>

§ 615. **No Delivery.** — Intent alone is not enough. A declaration of intent to give is no gift, nor is a parol promise to give anything but a nude pact.<sup>1</sup>

(a) Where the entry was in the depositor's name, "Sub. to E. M.", and the depositor kept possession of the book, used some of the money, and never told E. M., there was no gift, for the indispensable element of loss of dominion was lacking.<sup>2</sup>

(b) So where a deposit was to "J. C., subject to his order or to the order of M.", his daughter, as the only mode in which deposits could be changed from one account to another in the bank was by payment on one account and deposit on the other, it was

<sup>2</sup> *Smith v. Speer*, 34 N. J. Eq. 336.

<sup>3</sup> *Burton v. Bridgeport Savings Bank*, 52 Conn. 398; *Turnbull v. Turnbull*, 118 App. Div. 449 (1907), 103 N. Y. S. 499.

<sup>4</sup> *Parcher v. Saco & Biddeford Savings Bank*, 78 Me. 470, 7 Atl. 266; *Savings Bank v. Fogg*, 82 Me. 538, 20 Atl. 92; *Sullivan v. Sullivan*, 39 App. Div. (Hun, N. Y.) 99 (1899).

<sup>5</sup> *Barnum v. Reed*, 163 Ill. 388, 26 N. E. 572.

<sup>6</sup> *Daniel v. Smith*, 75 Cal. 548, 17 Pac. 683.

<sup>1</sup> § 615. *Kekewich v. Manning*, 1 DeG. M. & G. 176; *Grangiac v. Arden*, 10 Johns. (N. Y.) 293; *Robinson v. Ring*, 72 Me. 140; *Martin v. Funk*, 75 N. Y. 137; *Matter of Crawford*, 113 N. Y. 560, 21 N. E. 142; *McMahon v. Bank*, 67 Conn. 78, 34 Atl. 709; *Peters v. Fort Madison Construction Co.*, 72 Iowa 405, 34 N. W. 190; *McNamara v. McDonald*, 69 Conn. 484, 38 Atl. 54.

<sup>2</sup> *Northrop v. Hale*, 73 Me. 66; *Geary v. Page*, 9 Bosw. (N. Y.) 290.

held, delivery of the book did not pass the money, it was subject to J. C.'s order.<sup>3</sup>

(c) Depositing money in a savings bank to the credit of another is *prima facie* evidence of intent to give the amount, but where the pass-book provides that the deposit cannot be withdrawn without producing the book, retention of this pass-book and failure to notify the donee of the credit, indicate an intent not to perfect the gift at the time of the deposit.<sup>4</sup>

Where a husband deposits money in a bank in the name of his wife and receives a pass-book in which she is credited with the amount of the deposit, but at the same time delivers to the bank a signature card which contains the directions in the name of the wife that the signature to be recognized by the bank is the name of the wife per the husband, there is no gift.<sup>4a</sup>

And where a husband makes a written statement in his pass-book that, in consideration of natural love and affection for his wife, he gave her all the money credited, or to be credited to him in the book, there is no gift if he continues to make deposits, and to draw from the fund from time to time.<sup>4a</sup>

(d) Where A., about to die, told her son to get her bank-book, then in possession of her son-in-law, settle her debts, and divide the remainder among her children, it was held no gift *causa mortis*, because no delivery.<sup>5</sup> So where A. gave B. his savings bank book as part funds to carry out the provisions of a written instrument, which he also gave to B., and told B. in E.'s presence that the remainder of the necessary money was in his trousers, which E. would give to him, and E. did give them to B. after A.'s death, it was held that there was no sufficient delivery of the money, and as the gift was entire, the whole transaction failed.<sup>6</sup>

The donee must take possession *and retain it until the death of the donor*. Accordingly, where a mother gave her son a pocket-book and he left it where it was when she gave it to him and did not get possession until after his mother's death there was no gift *causa mortis*.<sup>7</sup>

<sup>3</sup> *Murray v. Cannon*, 41 Md. 466; *Cox v. Hill*, 6 Md. 274; *Curry v. Powers*, 70 N. Y. 212. See *Ashbrook v. Ryon*, 2 Bush (Ky.) 228.

<sup>4</sup> *Orr v. McGregor*, 43 Hun (N. Y.) 529.

<sup>4a</sup> *First National Bank v. Taylor*, 142 Ala. 456, 37 So. 695 (1904).

<sup>4a</sup> *Dougherty v. Moore*, 71 Md. 248, 18 Atl. 35.

<sup>5</sup> *Case v. Dennison*, 9 R. I. 88.

<sup>6</sup> *McGrath v. Reynolds*, 116 Mass. 566.

<sup>7</sup> *Dunbar v. Dunbar*, 80 Me. 152, 13 Atl. 578.

## CHAPTER XXXVIII

### SAVINGS BANKS

#### NATURE.

- § 617. The depositors in a savings bank stand in the position of stockholders in a commercial bank.
- § 618. The constitution of the bank determines the relation of depositors and the bank. The fact that the name of the bank contains the word "Savings" does not affect this relation, unless the depositor is misled thereby to his injury.

DEPOSITOR'S LIEN. By-law authorizing withdrawing deposit without reference to the state of the investment.

- § 619. PASS-BOOK only *prima facie* evidence.

- § 620. RULES AND AMENDMENTS.

Those existing at the time a depositor opens an account form part of his contract with the bank.

- § 620 a. Amendments after this time do not bind him without notice, even as to sums deposited by him after the amendment. All dealings on his account are done under the contract fixed by the original deposit until both parties assent to a change.

- § 620 b. Production of book.

A common rule is, that any payment made to one producing the book shall discharge the bank. This is upheld

- § 620 c. by the courts, but the bank must exercise due care; the rule will not relieve it from responsibility for a negligent payment.

Loss of book does not forfeit the deposit.

A payment in violation of by-law makes the bank liable, though the depositor was negligent.

INSOLVENCY OF. See chapter on Insolvency.

- § 620 A. PAYMENT OF A DEPOSIT TO AN ADMINISTRATOR.

§ 617. **Nature of a Savings Bank.** — The depositors are the bank, the trustees and officers<sup>a</sup> are their agents for receiv-

<sup>a</sup> § 617. The *managing officers* or trustees of a savings bank are held to the same duty as ordinary trustees of a direct trust and they cannot excuse themselves from the consequences of their misconduct or of their ignorance or negligence by averring that they have failed merely to exercise ordinary skill, care and vigilance, or that they did not possess those qualities. *Greenfield Savings Bank v. Abercrombie*, 211 Mass. 252, 97 N. E. 897, 1913B Ann. Cas. 420, n., 39 L. R. A. (N. S.) 173, n. See *Lippitt v. Ashley*, 89 Conn. 451, 94 Atl. 995 (1915), holding that the directors are liable for not properly supervising the treasurer's conduct of

ing <sup>b</sup> and loaning <sup>c</sup> their money; <sup>1</sup> and the profits belong to the

his office. They are also liable for losses resulting from investing the funds of the bank on personal security. *Greenfield Savings Bank v. Abercrombie, supra*; *Winchester v. Howard*, 136 Cal. 432, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153 (1902); but they are not liable for errors of judgment. *Greenfield Savings Bank v. Abercrombie, supra*. In California they are sureties for their fellow directors. *Winchester v. Howard, supra*.

While the board of directors is clothed with the management of the affairs and business of the bank, *West v. Topeka Savings Bank*, 66 Kan. 524, 72 Pac. 257, 97 Am. St. Rep. 385, 63 L. R. A. 137 (1901); the cashier has no authority to draw checks in the name of the bank in favor of those with whom he has a speculative account for his own use as margins in speculation, *St. Charles Savings Bank v. Edwards*, 243 Mo. 553, 147 S. W. 978 (1912); nor has the president authority to offer to convey to a town the fee in a private way over property owned by the bank. *Newburyport Savings Inst. v. Brookline*, 220 Mass. 300, 107 N. E. 939 (1915). But if the bank gives its president who is its chief executive officer authority to represent it, it is bound by his acts in such transactions, even though he converts to his own use the proceeds of commercial paper. *State v. Corning Savings Bank*, 139 Iowa 338, 115 N. W. 937 (1908). See also *Scow v. Farmers' etc. Savings Bank*, 136 Iowa 1, 111 N. W. 32 (1907).

The liability may be enforced by a creditor, *Winchester v. Howard, supra*; or by the assignee of a depositor. *Winchester v. Howard, supra*; There need be no demand before suit, *Winchester v. Howard, supra*; nor need the claim be reduced to judgment. *Winchester v. Howard, supra*; and the statute of limitations does not begin to run until there is a discovery of the wrong. *Greenfield Savings Bank v. Abercrombie, supra*. See *Lippitt v. Ashley, supra*.

For a case on *pleading* see *Greenfield Savings Bank v. Abercrombie, supra*.

<sup>b</sup> Savings Banks may receive special deposits. *Sherwood v. Home Savings Bank*, 131 Iowa 528, 109 N. W. 9 (1906).

<sup>c</sup> The power to loan may be restricted by the by-laws and rules of the bank. *Greenfield Savings Bank v. Abercrombie*, 211 Mass. 252, 97 N. E. 897, 39 L. R. A. (N. S.) 173, 1913B Ann. Cas. 420. It also may be restricted by the charter or general laws. *Greenfield Savings Bank v. Abercrombie, supra*. See *Gerrity v. Wareham Savings Bank*, 202 Mass. 214, 88 N. E. 1084 (1909).

<sup>1</sup> *Cogswell v. Rockingham Ten Cents Savings Bank*, 59 N. H. 44; *Coite v. Soc. for Savings*, 32 Conn. 173; *Bunnell v. Collinsville Savings Soc.*, 38 Conn. 203; *Osborn v. Byrne*, 43 Conn. 155; *Huntington v. Savings Bank*, 96 U. S. 338, 24 L. ed. 777; *Burrill v. Dollar Savings Bank*, 92 Pa. St. 134; *Newark Savings Institution Case*, 28 N. J. Eq. 552; *Lippitt v. Ashley*, 89 Conn. 451, 94 Atl. 995 (1915); *State v. St. Paul Savings Bank*, 87 Minn. 473, 92 N. W. 403 (1902); *State v. People's National Bank*, 75 N. H. 27, 70 Atl. 542 (1908).

Some authorities say that the relationship between the bank and the depositor is that of debtor and creditor. *Ladd v. Androscoggin County Savings Bank*, 96 Me. 520, 52 Atl. 1016 (1902); *Schippers v. Kempkes*, 72 N. J. Eq. 948, 67 Atl. 1042 (1907), affirmed in 72 N. J. Eq. 948, 73 Atl. 1118; *Robinson v. Aird*, 43 Fla. 30, 29 So. 633 (1901); *Lippitt v. Thames L. & T. Co.*, 88 Conn. 185, 90 Atl. 369 (1914), certificate of deposit.

depositors,<sup>2</sup> even though a statute limits the rate of dividends payable by the bank and provides for the accumulation of a surplus as a contingent fund.<sup>3</sup>

§ 618. **Effect of Name "Savings Bank."** — **Depositor's Lien.** — Although a bank may be called a savings bank, if it is really a stockholders' bank, where the capital is owned by the shareholders, the name will amount to nothing (unless it produces actual harm to a depositor by misleading him without his fault); and in such a bank a deposit creates the relation of debtor and creditor, and the depositor has no lien or trust in the bonds in which the money he deposits is invested, as is the case in a savings bank, even though the bank officers promise to hold the bonds for his benefit; such a lien can only be created by mortgage or pledge.<sup>a</sup> A by-law authorizing a savings deposit to be withdrawn after giving due notice, without regard to the condition of the investment at the time,

And it has also been held that the relationship of a depositor is not that of a mere creditor but that it is more analogous to that of stockholders in banks of discount, or even in business corporations. *Mann v. State Treasurer*, 74 N. H. 345, 68 Atl. 130, 15 L. R. A. (N. S.) 150 (1907); *Wood v. Connecticut Savings Bank*, 87 Conn. 341, 87 Atl. 983 (1913); *State v. People's National Bank*, 75 N. H. 27, 70 Atl. 542 (1908).

Managers of a saving institution are trustees of a public franchise which they hold for the benefit of the public at large as well as for the depositors. They occupy the position of the holders of a public trust of a benevolent and charitable nature. They have no right to destroy the entity of the institution and transfer to themselves, as managers of a trust company, its most valuable asset, good will: and a depositor or the attorney general may maintain a bill to prevent such dissolution, even though the depositor would receive back his deposit and share of the surplus. *Barrett v. Bloomfield Savings Institution*, 64 N. J. Eq. 425, 54 At. 543 (1903).

<sup>2</sup> *Francestown Bank Case*, 63 N. H. 138; *Bank Commissioners v. Watertown Savings Bank*, 81 Conn. 261, 70 Atl. 1038 (1908); *Campbell v. Schenectady Savings Bank*, 114 App. Div. 337 (1906), 99 N. Y. S. 927. Under Iowa statutes savings banks differ radically from such banks as originally organized. "Instead of being controlled by disinterested persons and the profits belonging to the depositors as formerly, the officers represent the bank and the profits accrue to the benefit of the stockholders." *Sherwood v. Home Savings Bank*, 131 Iowa 528, 109 N. W. 9 (1906); *State v. Corning Savings Bank*, 139 Iowa 338, 115 N. W. 937 (1908). See also *Colorado Savings Bank v. Evans*, 12 Colo. App. 334, 56 Pac. 981.

<sup>3</sup> *Bank Commissioners v. Watertown Savings Bank*, 81 Conn. 261, 70 Atl. 1038 (1908).

<sup>a</sup> § 618. The mere fact that a national bank pays interest on deposits does not mean that it is doing a savings bank business. *State v. People's National Bank*, 75 N. H. 27, 70 Atl. 542 (1908), quoting the text. See also *Williams v. Johnson*, 50 Mont. 7, 144 Pac. 768 (1914); *Langdale v. Citizens' Bank*, 121 Ga. 105, 48 S. E. 708, 104 Am. St. Rep. 94, 69 L. R. A. 341 (1904).

indicates that the depositor has no trust in the investment; otherwise he would have to await the maturity of the note on which his money is loaned.<sup>1</sup>

§ 619. **Pass-book only shows State of Funds.**—The pass-book only shows the state of the funds, and a depositor can prove by parol the terms of a contract for keeping a deposit.<sup>1</sup>

The pass-book is a book of original entry and is entitled to as much credit as the books of the bank.<sup>2</sup>

Where a figure in the pass-book is obscure and the bank and the depositor disagree as to what it is, the question is one for the jury.<sup>3</sup>

§ 620. **Rules and their Amendment.**—The regulations<sup>0</sup> of a savings bank for withdrawing deposits, if properly made known to the depositor, are part of the contract between him and the bank. And it is not necessary that he signify an acceptance thereof in writing.<sup>a</sup> They are intended for the protection of bank and depositor against fraud and forgery.<sup>1</sup> And it is generally held that such a regulation in the shape of a by-law enters into the contract of deposit, and binds the depositor; <sup>2</sup> though in Connect-

<sup>1</sup> *Ward v. Johnson*, 95 Ill. 215.

<sup>1</sup> § 619. *Davis v. Lenawee County Savings Bank*, 53 Mich. 163, 18 N. W. 629 (1884).

<sup>2</sup> *Kux v. Savings Bank*, 93 Mich. 511, 53 N. W. 828.

<sup>3</sup> *Ibid.*

<sup>0</sup> § 620. A state may require the bank to turn over to the proper state officers money in accounts inactive over thirty years, where the depositor cannot be found. *Provident Savings Inst. v. Malone*, 221 U. S. 660, 55 L. ed. 899, 31 Sup. Ct. 661 (1911).

<sup>a</sup> *Ladd v. Augusta Savings Bank*, 96 Me. 510, 52 Atl. 1012 (1902).

<sup>1</sup> *Israel v. Bowery Savings Bank*, 9 Daly (N. Y.) 507; *Mitchell v. Home Savings Bank*, 38 Hun (N. Y.) 257. *Chase v. Waterbury Savings Bank*, 77 Conn. 295, 59 Atl. 37, 69 L. R. A. 329 (1904); *Langdale v. Citizens' Bank*, 121 Ga. 105, 48 S. E. 708, 104 Am. St. Rep. 94, 69 L. R. A. 341 (1904); *Webber v. Cambridgeport Savings Bank*, 186 Mass. 314, 71 N. E. 567 (1904); *Vincent v. Port Huron Savings Bank*, 147 Mich. 437, 111 N. W. 90 (1907); *Hough Ave. Savings etc. Co. v. Anderson*, 78 Ohio St. 341, 85 N. E. 498, 125 Am. St. Rep. 707, 18 L. R. A. (n. s.) 431 (1908); *Ladd v. Augusta Savings Bank*, 96 Me. 510, 52 Atl. 1012, 58 L. R. A. 288 (1902); *Thompson v. Hazlewood Savings etc. Co.*, 234 Pa. St. 452, 83 Atl. 284 (1912).

A regulation that a deposit could be withdrawn on four months' notice did not constitute a contract that upon any and all circumstances it would be paid back upon four months' notice. The rule was for the benefit of the bank so that the money could not be withdrawn in less than the stipulated time. It would not prevent or defeat any special agreement to the effect that a given deposit should remain beyond that time. *Thompson v. Hazlewood Savings etc. Co.*, 234 Pa. St. 452, 83 Atl. 284 (1912).

<sup>2</sup> *Levy v. Franklin Savings Bank*, 117 Mass. 448; *Donlan v. Provident Institution*, 127 Mass. 183; *Goldrick v. Bristol County Savings Bank*, 123

icut it is said that it "must be inserted in the book and assented to by the depositor."<sup>3</sup>

### *Amendment of By-laws*

(a) It must be carefully noted, however, that it is only the by-laws existing at the time of opening a deposit account that enter into the contract, irrespective of actual notice to the depositor. By dealing with the bank he adopts its regulations existing at the time; but if these are altered afterward notice of the change must be given the depositor in order to affect him, even as to his deposits made after the amendment is passed, for all his deposits are deemed to be made under the original contract. And it makes no difference though one of the by-laws at the time of opening the deposit account gave the trustees authority to amend the by-laws; such a rule cannot give power to change materially the contract of the depositor without his knowledge.<sup>4</sup>

### *Production of Book*

(b) One of the commonest rules is, that the bank-book must be produced in order to draw the deposit,<sup>4a</sup> and that production of the book shall be authority to the bank to pay the person producing it. This is regarded as a reasonable and binding regula-

Mass. 320; *Burrill v. Dollar Savings Bank*, 92 Pa. St. 134; *Hough Ave. Savings Co. v. Anderson*, 78 Ohio St. 341, 85 N. E. 498, 125 Am. St. Rep. 707. 18 L. R. A. (n. s.) 431, n. (1908); *Chase v. Waterbury Savings Bank*, 77 Conn. 295, 59 Atl. 37 (1904); *Dinini v. Mechanics Savings Bank*, 85 Conn. 225, 82 Atl. 580 (1912); *Vincent v. Port Huron Savings Bank*, 147 Mich. 437, 111 N. W. 90 (1907); *Langdale v. Citizens' Bank*, 121 Ga. 105, 48 S. E. 708, 69 L. R. A. 341, 104 Am. St. Rep. 94 (1904), depositor assented in writing to the rule.

<sup>3</sup> *Eaves v. People's Savings Bank*, 27 Conn. 234. But see *Dinini v. Mechanics Savings Bank*, 85 Conn. 225, 82 Atl. 580 (1912), holding that a foreigner unfamiliar with the English language who accepts and uses a bank book is presumed to know the contents of the by-laws printed therein. But there is no such presumption when the by-law is not under its proper title. *Woods v. Connecticut Savings Bank*, 87 Conn. 341, 87 Atl. 983 (1913).

<sup>4</sup> *Kimins v. Boston Five Cents Savings Bank*, 141 Mass. 33, 6 N. E. 242.

<sup>4a</sup> This rule may be waived. *Wood v. Connecticut Savings Bank*, 87 Conn. 341, 87 Atl. 983 (1913); *Brooks v. Erie County Savings Bank*, 169 App. Div. 73 (1915), 154 N. Y. S. 692, and a statute requiring the production of the book when payment is made is not arbitrary, and if the bank has no rule to that effect the depositor can recover his deposit without presenting the book if he can show a satisfactory reason for his failure to present it. *Meighan v. Emigrant Industrial Savings Bank*, 168 App. Div. 542 (1915), 153 N. Y. S. 312.



tion,<sup>4b</sup> and if the bank pay to one having the book, there being no circumstances to excite suspicion and base an imputation of negligence on the part of the bank, the payment is good.<sup>5</sup> And even; where the book was stolen, and the depositor was dead and his executor had published the usual notice to the heirs to appear and show cause against probate of his will, and the bank in ignorance of all this paid upon production of the book, it was found by the jury that the bank had not seen the notice, and had not been negligent, and the payment was upheld.<sup>6</sup>

But if the bank has a rule that upon the death of the depositor it will pay the amount standing to the credit of the deceased to his or her representatives it cannot defend itself by paying to another even though it uses due care.<sup>6a</sup> Especially is this so, if the bank knows of the depositor's death.<sup>6b</sup>

<sup>4b</sup> *Vincent v. Port Huron Savings Bank*, 147 Mich. 437, 111 N. W. 90 (1907). Its purpose is to protect the bank against the payment of deposits to others than those entitled thereto. *Meighan v. Emigrant Industrial Savings Bank*, 168 App. Div. 542 (1915), 153 N. Y. S. 312.

<sup>5</sup> *Schoenwald v. Metropolitan Savings Bank*, 57 N. Y. 418; *Levy v. Franklin Savings Bank*, 117 Mass. 448; *Hayden v. Brooklyn Savings Bank*, 15 Abb. Pr. N. S. (N. Y.), 297; *Goldrick v. Bristol County Savings Bank*, 123 Mass. 320; *Burrill v. Dollar Savings Bank*, 92 Pa. St. 134, book stolen and deposit paid before notice had been given to bank of the loss of the book; *Winter v. Williamsburg Savings Bank*, 68 App. Div. 193 (1902), 74 N. Y. S. 140; *Campbell v. Schenectady Savings Bank*, 114 App. Div. 337 (1906), 97 N. Y. S. 927; *Moline State Savings Bank v. Liggett*, 106 Ill. App. (1902); *Langdale v. Citizens' Bank*, 121 Ga. 105, 48 S. E. 708, 104 Am. St. Rep. 94, 69 L. R. A. 341 (1904); *Dinini v. Mechanics Savings Bank*, 85 Conn. 225, 82 Atl. 580 (1912), bank book stolen and depositor's name forged; *Ladd v. Augusta Savings Bank*, 96 Me. 510, 52 Atl. 1012 (1902); *Arkofsky v. State Savings Bank*, 91 Minn. 440, 98 N. W. 326, 103 Am. St. Rep. 519 (1904), the plaintiff deposited the money in the name of Sachs who subsequently stole the bank book and drew the money; *Mahon v. South Brooklyn Sav. Inst.*, 175 N. Y. 69, 67 N. E. 118, 96 Am. St. Rep. 603 (1903). But if the deposit is paid upon the presentation of the book with a forged order the depositor may, in Massachusetts, recover from the bank. *Kingsley v. Whitman Savings Bank*, 182 Mass. 252, 65 N. E. 161, 94 Am. St. Rep. 650 (1902). See, however, *Felman v. Schiff*, 186 Ill. App. 67 (1914); *Winter v. Williamsburg Savings Bank*, 68 App. Div. 193 (1902), 74 N. Y. S. 140; *Kelley v. Buffalo Savings Bank*, 88 App. Div. 374 (1903), 84 N. Y. S. 642, reversed in 180 N. Y. 171, 72 N. E. 995, 105 Am. St. Rep. 720, n., 69 L. R. A. 317, n.

<sup>6</sup> *Donlan v. Provident Institution*, 127 Mass. 183; *Kelley v. Buffalo Savings Bank*, 180 N. Y. 171, 72 N. E. 995, 105 Am. St. Rep. 720, n., 69 L. R. A. 317, n. (1904).

<sup>6a</sup> *Mahon v. South Brooklyn Sav. Inst.*, 175 N. Y. 69, 67 N. E. 118, 96 Am. St. Rep. 603 (1903); *Hoffman v. Union Dime Savings Inst.*, 95 App. Div. 329 (1904), 88 N. Y. S. 686.

<sup>6b</sup> *O'Brien v. Elmira Savings Bank*, 99 App. Div. 76 (1904), 91 N. Y. S. 364.

(c) But the bank must exercise reasonable care.<sup>7</sup> A stipulation between a savings bank and a depositor, that his deposit may be paid to any one presenting his book, does not relieve the bank from the duty of exercising good faith and reasonable care.<sup>7a</sup> The bank must not knowingly or recklessly pay to a wrongful possessor of the book;<sup>8</sup> and if there are circumstances calculated to excite the suspicions of a person of ordinary prudence and foresight, as if the presenter of the book is of a different sex from the depositor,<sup>9</sup> or if the signature of the presenter is so different from that of the

<sup>7</sup> *Appleby v. Erie County Savings Bank*, 62 N. Y. 12; *Sullivan v. Lewiston Institution*, 56 Me. 507; *Hayden v. Brooklyn Savings Bank*, 15 Abb. Pr. n. s. (N. Y.) 297; *Eaves v. People's Savings Bank*, 27 Conn. 229; *Kimball v. Norton*, 59 N. H. 1; *Levy v. Franklin Savings Bank*, 117 Mass. 448; *Heath v. Portsmouth Savings Bank*, 46 N. H. 78; *Brown v. Merrimack River Savings Bank*, 67 N. H. 549, 39 Atl. 336; *Hough Ave. Savings Co. v. Andersson*, 78 Ohio St. 341, 85 N. E. 498, 125 Am. St. Rep. 707, 18 L. R. A. (n. s.) 431, n. (1908); *Hankowska v. Buffalo Savings Bank*, 155 App. Div. 694 (1913), 140 N. Y. S. 891; *Ladd v. Augusta Savings Bank*, 96 Me. 510, 52 Atl. 1012, 58 L. R. A. 288 (1902); *Langdale v. Citizens' Bank*, 121 Ga. 105, 48 S. E. 708, 104 Am. St. Rep. 94, 69 L. R. A. 341 (1904); *Chase v. Waterbury Savings Bank*, 77 Conn. 295, 59 Atl. 37, 69 L. R. A. 329 (1904); *Dinini v. Mechanics Savings Bank*, 85 Conn. 225, 82 Atl. 580 (1912); *Wood v. Connecticut Savings Bank*, 87 Conn. 341, 87 Atl. 983 (1913); *Kelley v. Buffalo Savings Bank*, 180 N. Y. 171, 72 N. E. 995, 105 Am. St. Rep. 720, n., 69 L. R. A. 317, n. (1904); *Schneider v. Union Dime Bank*, 156 N. Y. S. 753. It is negligence not to have a signature for comparison. *Ladd v. Augusta Savings Bank*, 96 Me. 510, 52 Atl. 1012 (1902); and the question of contributory negligence is not involved. *Chase v. Waterbury Savings Bank*, 77 Conn. 295, 59 Atl. 37 (1904). But only ordinary care is required. *Kelley v. Buffalo Savings Bank*, 180 N. Y. 171, 72 N. E. 995, 105 Am. St. Rep. 720, 69 L. R. A. 317 (1904); *Mahon v. South Brooklyn Sav. Inst.*, 175 N. Y. 69, 67 N. E. 118, 96 Am. St. Rep. 603 (1903); *Krishkan v. New York Savings Bank*, 156 N. Y. S. 300.

<sup>7a</sup> *Fox v. Onondaga Savings Bank*, 3 Silverman (N. Y.) 397. A stipulation that in ALL cases payment upon the presentation of a deposit book shall be a discharge to the bank does not relieve it from the duty of exercising good faith. *Hough Ave. Savings Co. v. Andersson*, 78 Ohio St. 341, 85 N. E. 498, 125 Am. St. Rep. 707, 18 L. R. A. (n. s.) 431, n. (1908).

A by-law to the effect that unless a depositor is personally present with his pass-book when drawing money "an order properly signed and witnessed must accompany the presentation of the book in case of withdrawal" does not apply where a forger appears as, and is believed to be, the true owner. *Langdale v. Citizens' Bank*, 121 Ga. 105, 48 S. E. 708, 104 Am. St. Rep. 94, 69 L. R. A. 341 (1904).

<sup>8</sup> *Kimball v. Norton*, 59 N. H. 1 (1879); *Farmer v. Manhattan Savings Institution*, 60 Hun (N. Y.) 462; *Brown v. Merrimack River Savings Bank*, 67 N. H. 549, 39 Atl. 336; *Wegner v. Second Ward Savings Bank*, 76 Wis. 242, 44 N. W. 1096; *Langdale v. Citizens' Bank*, 121 Ga. 105, 48 S. E. 708, 104 Am. St. Rep. 94, 69 L. R. A. 341 (1904).

<sup>9</sup> *Allen v. Williamsburgh Savings Bank*, 69 N. Y. 314.

depositor possessed by the bank that the discrepancy would be easily discovered by one competent for the position of cashier or teller,<sup>10</sup> the bank would be put upon inquiry; otherwise if the discrepancy would require a critical examination to detect it, especially if it is one about which experts might honestly differ.<sup>10</sup> If a bank agree to use its "best efforts" to make proper payments, it will not be excused by mere good faith and reasonable ordinary care in paying on production of the book.<sup>11</sup>

Where a deposit in a savings bank was paid to a person who produced the pass-book, and correctly answered the test questions put to her, it was held that all necessary care had been exercised by the bank.<sup>11a</sup>

### *Lost Book*

(d) If a depositor lose<sup>11a1</sup> his book, the regulation that a deposit can be drawn only on production of the book is not to be construed as a forfeiture, but to have a reasonable interpretation in reference to its object, which is to protect both parties,<sup>11b</sup> and it may not be

<sup>10</sup> *Appleby v. Erie County Savings Bank*, 62 N. Y. 12; *Israel v. Bowery Savings Bank*, 9 Daly (N. Y.) 507; *Wood v. Connecticut Savings Bank*, 87 Conn. 341, 87 Atl. 983 (1913); *Kelley v. Buffalo Savings Bank*, 88 App. Div. 374 (1903), 84 N. Y. S. 642.

If there is nothing to excite suspicion it is not negligence to fail to compare the signature of the presenter with that of the depositor. *Langdale v. Citizens' Bank*, 121 Ga. 105, 48 S. E. 708, 104 Am. St. Rep. 94, 69 L. R. A. 341 (1904). But see *Ladd v. Augusta Savings Bank*, 96 Me. 510, 52 Atl. 1012 (1902), holding that the bank must decide upon the genuineness of the order at its peril. *Ladd v. Androsceoggin Co. Savings Bank*, 96 Me. 520, 52 Atl. 1016 (1902).

<sup>11</sup> See note 9.

<sup>11a</sup> *Hales v. Seamen's Bank for Savings*, 28 App. D. (Hun, N. Y.) 407; *Campbell v. Schenectady Savings Bank*, 114 App. Div. 337 (1906), 99 N. Y. S. 927. But see *Ladd v. Augusta Savings Bank*, 96 Me. 510, 52 Atl. 1012, 52 L. R. A. 288 (1902), which holds that it is negligence for a bank having a large number of depositors not to have the signature of the depositor for comparison.

<sup>11a1</sup> A by-law requiring immediate notice in writing in case of loss of a pass-book is a reasonable regulation. *Langdale v. Citizens' Bank*, 121 Ga. 105, 48 S. E. 708, 104 Am. St. Rep. 94, 69 L. R. A. 341 (1904); *Ladd v. Augusta Savings Bank*, 96 Me. 510, 52 Atl. 1012, 58 L. R. A. 288 (1902); but it may be waived, and is waived where no written notice is requested and the refusal to pay a depositor is based on the ground that the depositor must give a bond of indemnity. *Meirke v. Jefferson County Savings Bank*, 208 N. Y. 347, 101 N. E. 889, 1914D Ann. Cas. 21, 46 L. R. A. (N. S.) 194, reversing 151 App. Div. 899, 135 N. Y. S. 1127. See *Wood v. Connecticut Savings Bank*, 87 Conn. 341, 87 Atl. 983 (1913).

<sup>11b</sup> *Candee v. Connecticut Savings Bank*, 81 Conn. 372, 71 Atl. 551 (1908).

arbitrarily enforced.<sup>11c</sup> A depositor in such case must show that the book is lost <sup>11d</sup> or destroyed,<sup>11e</sup> and may then draw his money.<sup>12</sup> The bank must be properly secured against loss by a second payment on a possible production of the book, and this may be done by a bond of indemnity,<sup>13</sup> which must be tendered by the depositor or his administrator before demanding payment. Such is especially true where a statute also provides that payments shall be entered upon the pass-book except for good cause shown and on assurances satisfactory to the officers of the bank.<sup>13a</sup>

### *Payment Contrary to By-law*

(e) A by-law provided that deposits could be withdrawn upon check properly witnessed. The bank was held liable for paying on forged checks, not thus witnessed, to the son of the old lady depositor, who had possession of the pass-book. It was not a question of negligence, and any contributory neglect of the depositor did not affect the matter; it was a payment contrary to rules, and the bank was held.<sup>14</sup>

<sup>11c</sup> *Bayer v. Commonwealth Trust Company*, 144 Mo. App. 676, 129 S. W. 268 (1910).

<sup>11d</sup> A mere statement by an administrator is not sufficient proof. *Mierke v. Jefferson County Savings Bank*, 134 N. Y. S. 44 (1911), affirmed in 151 App. Div. 899, 135 N. Y. S. 1127.

<sup>11e</sup> A by-law providing that no payment shall be made without the production of the bank book unless it shall have been proved to the satisfaction of the trustees or treasurer that such book has been lost or destroyed does not oust the courts of their jurisdiction and make the trustee or treasurer the final arbiter of the question. *Webber v. Cambridgeport Savings Bank*, 186 Mass. 314, 71 N. E. 567 (1904).

<sup>12</sup> *Warhus v. Bowery Savings Bank*, 21 N. Y. 546; *Wagner v. Howard Savings Institution*, 52 N. J. L. 225, 19 Atl. 212. See *Mierke v. Jefferson County Savings Bank*, 134 N. Y. S. 44, affirmed in 151 App. Div. 899, 135 N. Y. S. 1127.

<sup>13</sup> *Wall v. Provident Institution*, 3 Allen (Mass.) 96.

<sup>13a</sup> *Vincent v. Port Huron Savings Bank*, 147 Mich. 437, 111 N. W. 90 (1907).

When the security of the bank can be fully accomplished without requiring the production of a bond, it cannot withhold the money because the bond is not furnished. *Bayer v. Commonwealth Trust Co.*, 144 Mo. App. 676, 129 S. W. 268 (1910). See also *Mierke v. Jefferson County Savings Bank*, 208 N. Y. 347, 101 N. E. 889, 1914D Ann. Cas. 21, n., 46 L. R. A. (n. s.) 194, n.; reversing 151 App. Div. 899, 135 N. Y. S. 1127; *Roughan v. Chenango Valley Savings Bank*, 158 App. Div. 786 (1913), 144 N. Y. S. 508.

<sup>14</sup> *People's Savings Bank v. Cupps*, 91 Pa. St. 315 (1879); *Chase v. Waterbury Savings Bank*, 77 Conn. 295, 59 Atl. 37, 69 L. R. A. 329 (1904).

§ 620 A. **Payment of Deposit to a Foreign Administrator.** — When a savings bank in good faith pays a deposit standing in the name of decedent to an administrator appointed in the state of his domicile, upon presentation of the pass-book and a certified copy of his letters of administration, without knowledge that an administrator has been appointed in the state where the bank is located, it is not liable where it does not appear that the decedent had any creditors whose claims would otherwise be lost.<sup>1</sup>

<sup>1</sup> § 620 A. *Maas v. German Savings Bank*, 73 App. Div. 524 (1902), 77 N. Y. S. 256; affirmed in 176 N. Y. 377, 68 N. E. 658, 98 Am. St. Rep. 689 (1903).

## CHAPTER XXXIX

### INSOLVENCY

A complete treatment of this subject is not within our plan.

#### A. DEFINITION of "Insolvent" and "In Failing Circumstances."

§§ 622, 623 *a*.

§ 622 A. Effect of Insolvency.

#### B. PREFERENCES.

In case of special and specific deposits. § 567.

§ 623. Wrongful preferences.

§ 624. A lien resulting from a valid agreement prior to insolvency is good, though the deposit is not applied to satisfy it till after insolvency.

§ 625. Payments by a failing bank in the ordinary course of business received *bona fide* are good.

§ 626 O. Appointment of receiver.

§ 625 A. Payments after appointment of receiver.

Payments out of the ordinary course of business will not stand, though the payee was ignorant of the bank's condition.

§ 625 B. Right to sue bank.

§ 625 C. Removal of receiver.

Debts lawfully incurred are preferred to *ultra vires* debts. § 749 *b*.

§ 627. Charter preferences sometimes exist.

§ 490 A. Checks given by the bank prior to insolvency are preferred to the general debts in those States where a check is an assignment. §§ 539-541.

§ 511 *k*. Holders of checks drawn on the bank are not preferred.

§ 718. States are not preferred, either as shareholders or depositors.

#### C. RIGHTS OF DEPOSITORS.

(1) Liability of officers who receive deposits, knowing of the bank's insolvency.

(*a*) At common law they are not liable, unless their conduct was fraudulent in receiving the deposit, as if they know that the bank is *hopelessly insolvent*. If they have a reasonably well-grounded hope of saving the bank, they are not liable.

§ 628. (*b*) Statute liability sometimes is broader, as in Missouri and Illinois.

§ 629 A. Proof of claim.

(2) Recovery of deposit.

- § 629. (a) If a deposit is not fully received (§ 289 c) by the bank in the usual way before it becomes formally insolvent, or if its reception is a fraud, it can be recovered in full.  
Otherwise, a general depositor, even though the money be trust property, has no preference.
- § 630. (b) A specific-deposit identifiable may be reclaimed.
- § 589 b. If not identifiable (?) The best opinion is, No. See § 210.
- § 631. (c) Money of others (*e.g.* the proceeds of a collection) received by the bank after formal insolvency may be reclaimed in full, if its ownership is determinable; otherwise not.
- D. INSOLVENCY OF A SAVINGS BANK.
- §§ 632, 632 e. The creditors are preferred to depositors.
- §§ 632 a, c. Depositors cannot set off their ordinary deposits against debts due from them to the insolvent bank.
- § 632 b. But a special deposit that can be withdrawn on call, or a specific deposit, may be reclaimed in full or set off.
- § 632 d. A deposit is not made special merely by calling it so.
- § 632 f. Checks given by the bank before insolvency are preferred, except those given to depositors.
- E. INSOLVENCY REVOKES the power of a collecting bank to credit the proceeds on general account. §§ 248 a, 568 e.
- F. INSOLVENCY OF THE ISSUING BANK is the risk of the taker of bank bills. (?) § 662.
- G. SET-OFF OF BANK BILLS in case of insolvency of the issuing bank. § 641.
- H. THE MAKER OF A NOTE held by the bank may, in case of its insolvency, insist on the application of his deposit thereto. § 560.
- § 632 A. Insolvency of a Trust, Loan or Investment Company.
- § 632 A a. Jurisdiction.
- § 632 A b. Construction of by-law.
- § 632 A c. Construction of agreement.
- § 632 A d. Right of intervention by debenture holders.
- § 632 A e. Construction of statute.
- § 632 A f. Purchase of assets.
- § 632 A g. Preferences.
- § 632 A h. Set-off.
- § 632 A i. Superintendent of banks. 1. Right to demand security. 2. Right of action. 3. Succession of trusts. 4. Duty to provide place of business.
- § 632 A j. Interest.
- § 632 A k. Compensation of temporary receiver.

§ 622. Definition of "Insolvent" and "In Failing Circumstances." — A bank is *insolvent* (within Missouri constitution and statutes) when, from the uncertainty of its being able to realize on its assets in a reasonable time a sufficient amount to meet its liabilities, it makes an assignment by which the control of its affairs and property passes out of its hands. A bank is "*in*

*failing circumstances* " when in a state of uncertainty whether it will be able to sustain itself, depending on favorable or unfavorable contingencies, which in the course of business may occur, and over which its officers have no control.<sup>1</sup>

§ 622 A. **Effect of Insolvency.**—The existence of a bank, with the powers conferred by its charter, continues notwithstanding the insolvency of the bank and its suspension of business,<sup>0</sup> and the legal rights of the shareholders cannot be taken from them by a majority, however large.<sup>1</sup>

Where printed conditions in the pass-book of a banking firm require 30 or 60 days' notice of the depositor's intention to withdraw his deposit, the suspension of the firm constitutes a waiver of the right to such notice and demand.<sup>2</sup>

<sup>1</sup> § 622. *Dodge v. Mastin*, 5 McCrary 404. See also *State v. Hoffman*, 120 La. 949, 45 So. 951 (1908); *State v. Cramer*, 20 Idaho 639, 119 Pac. 30 (1911); *Fremont County v. Fremont County Bank*, 145 Iowa 8, 123 N. W. 782, 1912A Ann. Cas. 1220; *Youmans v. State*, 7 Ga. App. 101, 66 S. E. 383 (1909); *Parrish v. Commonwealth*, 136 Ky. 77, 123 S. W. 339 (1909); *Ellis v. State*, 138 Wis. 513, 119 N. W. 1110 (1909); *Olive Hill Imperial Bank v. Commonwealth*, 140 Ky. 210, 130 S. W. 1074 (1910); *People v. Oriental Bank*, 124 App. Div. 741 (1908), 109 N. Y. S. 509; *Commonwealth v. Tradesmen's Trust Co.*, 237 Pa. St. 316, 85 Atl. 363 (1912); *State v. Stevens*, 16 S. D. 309, 92 N. W. 420 (1902); *Livingstain v. Columbia Banking etc. Co.*, 81 S. C. 244, 62 S. E. 249, 22 L. R. A. (N. S.) 445 (1908).

<sup>0</sup> § 622 A. The period for which a bank was chartered not having expired, no forfeiture having been suffered and no judgment of dissolution having been rendered against it, it was in existence as a banking corporation and could sue on a note although it had gone into voluntary liquidation, and had ceased to transact any business except to collect debts owing to it and distribute the proceeds among its stockholders by way of closing up its affairs. But in such a case it was not subject to the banking act requiring a report of its financial condition to be made to the bank commissioner. *Wilson v. First State Bank*, 77 Kan. 589, 95 Pac. 404 (1908).

When the Superintendent of Banks takes possession of a bank the corporation is not extinguished. *Lafayette Trust Co. v. Hugginbotham*, 136 App. Div. 747 (1910), 121 N. Y. S. 489.

A banking commissioner who takes possession of a bank claiming it to be insolvent does so for the purpose of liquidating it and does not succeed to the execution of a trust held by the bank unless he does so by the force of statute. *Sullivan v. Knolt*, 156 Wise. 72, 145 N. W. 210 (1914).

In Kentucky a banking commissioner may, upon the insolvency of the bank, take and retain charge thereof for the purpose of liquidation. *Cartwell v. Commercial Bank & Tr. Co.*, 153 Ky. 798, 156 S. W. 1048 (1913); and he may sell the real estate of the bank. *Ex parte Smith*, Banking Commissioner, 160 Ky. 83, 169 S. W. 582 (1914).

<sup>1</sup> *Gresham v. Island City Savings Bank*, 2 Tex. Civ. App. 52.

<sup>2</sup> *Arnold v. Hart*, 176 Ill. 442, 52 N. E. 936; *Davis v. Industrial Manufacturing Company*, 114 N. C. 332, 19 S. E. 371.



When the bank becomes insolvent the double liability of stockholders and liability of directors for gross neglect and mismanagement are assets in the hands of the bank enforceable by the trustee for the benefit of creditors.<sup>3</sup>

In Georgia the president and directors of a bank are punishable if its insolvency is caused by their intended fraudulent act; and its insolvency is *prima facie* proof of such act.<sup>4</sup>

In Nebraska the assets of an insolvent bank may be turned over to those who give bond for the voluntary liquidation of the liabilities of the bank. In case the liabilities are not paid within the specified time the sureties are liable and it is immaterial that the assets are turned over to only one of the principals, where the sureties assent to or ratify such delivery.<sup>5</sup> And a single creditor may maintain an action upon the bond for his benefit alone.<sup>6</sup> The sureties on such a bond assume the burden of the bank's liquidation, and cannot use the assets of the bank in paying the expenses thereof to the prejudice of the creditors.<sup>7</sup>

In Illinois a banking corporation may prosecute its suit to final judgment for the purpose of closing up its affairs even though it goes into voluntary dissolution pending the litigation.<sup>8</sup>

Judicial proceedings on petition of the bank commissioners under the Pub. Sts. of N. H. 1891 c. 162, for winding up a banking corporation, in which an assignee is appointed in whom the title to all its property rests, do not operate to dissolve the corporation at once so as to preclude the rendition of a judgment against it by the federal courts.<sup>9</sup>

The power of a bank which becomes insolvent and goes into liquidation, to bind its stockholders ceases, except with reference to transactions implied in the duty of liquidation.<sup>10</sup> Its franchise to do business is terminated and it cannot be again acquired

<sup>3</sup> *Clark v. Bank of Union*, 72 W. Va. 491, 78 S. E. 785 (1913); *Benedum v. Citizens' Bank*, 72 W. Va. 124, 78 S. W. 656 (1913).

<sup>4</sup> *Youmans v. State*, 7 Ga. App. 101, 66 S. E. 383 (1909).

<sup>5</sup> *Taylor v. Weckerly*, 69 Neb. 739, 96 N. W. 618 (1903).

<sup>6</sup> *Rawson v. Taylor*, 69 Neb. 473, 95 N. W. 1033 (1903).

<sup>7</sup> *Hume v. Miller*, 75 Neb. 800, 106 N. W. 1006 (1906).

<sup>8</sup> *Commercial Loan etc. Co. v. Mallers*, 242 Ill. 50, 89 N. E. 661, 134 Am. St. Rep. 306, n. (1909).

<sup>9</sup> *Angle-American Land etc. Co. v. Cheshire Provident Inst.*, 124 Fed. 464 (1903), affirmed in 132 Fed. 968.

<sup>10</sup> *Covell v. Fowler*, 144 Fed. 535 (1906).

without reorganization as a new corporation.<sup>11</sup> Nor does the authority of a cashier to deliver a note continue.<sup>12</sup>

Liquidation also has the effect to mature a certificate of deposit given by the liquidating bank.<sup>13</sup>

§ 623. **Wrongful Preference.** — A pledge made by the officers of a bank of a promissory note belonging to the bank to secure a depositor apprehensive of money he had allowed the bank to use was held good as being done in the hope of preventing the bank's failure.<sup>9</sup>

(a) But on rehearing it was held that the transfer was made in contemplation of insolvency, and should be set aside.<sup>a</sup> The court said that "insolvency" is that condition of affairs in which a merchant or business man is unable to meet his obligations as they mature in the usual course of business. An *act of insolvency* takes place when this condition is demonstrated, and the person has actually failed to meet some of his obligations.<sup>b</sup> A bank is in *contemplation of insolvency* reasonably when the fact becomes apparent to its officers that it will presently be unable to meet its obligations. When the transfer under consideration was made, such knowledge existed (though the officers might hope otherwise), and the *natural and probable consequence* of the transfer was a preference; and since every person is to be presumed to intend the natural and probable consequence of his own acts, there was a legal intent to prefer, and this cannot be rebutted by showing another motive. The object of the law is to secure equal distribution, and prevent conduct which the actor can perceive in the exercise of reasonable foresight will prevent the

<sup>11</sup> Mercantile Trust Co. v. Miller, 166 Cal. 563, 137 Pac. 913 (1913).

<sup>12</sup> Casale v. Guion, 132 App. Div. 889 (1909), 116 N. Y. S. 294.

<sup>13</sup> First State Bank v. Bank of Braggs, 43 Okla. 342, 142 Pac. 1183 (1914).

<sup>9</sup> § 623. See R. S. § 5242.

<sup>a</sup> In New York under the General Business Law (Laws 1911 c. 393) § 25, depositors are entitled to the amount deposited with the Comptroller of the Currency by a private banker, and depositors in branches in other states cannot participate therein. *In re Rosett*, 203 Fed. 67 (1913); *id.*, 204 Fed. 431 (1913).

In Alabama, by the constitution, depositors and holders of bank notes have a preference over all other creditors. But the holder of a certificate of deposit bearing interest is not a depositor within the meaning of § 250 of the constitution. *Taylor v. Hutchingson*, 145 Ala. 202, 40 So. 108 (1905).

See Booth v. Atlanta Clearing House, 132 Ga. 100, 63 S. E. 907 (1908).

<sup>b</sup> The State v. Myers, 54 Kan. 206, 38 Pac. 296.

fulfilment of that object.<sup>1</sup> After a vote of the directors to close their bank and go into liquidation, any transfer of the assets of the bank to a creditor whereby that creditor secures a preference will be presumed to be made with a fraudulent intent.<sup>2</sup>

A creditor preferred and paid by a bank after its officers know it is insolvent must account to the receiver.<sup>3</sup>

Where payments of deposit certificates are made by a cashier knowing the bank is insolvent, but before it has committed any act of insolvency, all its obligations being met as they come due for six weeks after the said payments, such payments are not in violation of the U. S. Rev. Sts. § 5242.<sup>4</sup>

A bank honoring drafts drawn against a letter of credit where the name of the depositor of the money to purchase it was entered on a signature card on which was written "Guaranty for Letter of Credit" is not entitled to priority over other creditors of the issuing bank.<sup>5</sup>

When stockholders receive from a bank the amount for which they hold stock in the bank there is a withdrawal of their stock from the bank. When such withdrawal is on account of the insolvency of the bank and for the purpose of preventing the same going to the creditors it is fraudulent and void and the amount of such payments may be recovered by a receiver of the insolvent bank.<sup>6</sup>

A bank, placed in the hands of a receiver, filed a motion that it was solvent, set forth a scheme for reorganization and secured the return of its assets. It then proceeded to do business under a different name but under the old charter. Again it made an assignment and was placed in the hands of a receiver. The court held that in the distribution of its assets the depositors who were not parties to the agreement and to the application of the surrender of assets under the first receivership were entitled to priority over those who were such parties.<sup>7</sup> A transfer of certificate of deposit

<sup>1</sup> *Roberts v. Hill*, 23 Blatchf. 191.

<sup>2</sup> *National Security Bank v. Price*, 22 Fed. 697 (1885).

<sup>3</sup> *Atkinson v. Rochester Printing Company*, 114 N. Y. 168, 21 N. E. 178. See *Booth v. Atlanta Clearing House*, 132 Ga. 100, 63 S. E. 907 (1909), where the trustee was not chargeable with notice of insolvency and no preference was created. But see *Fitzpatrick v. McGregor*, 133 Ga. 332, 65 S. E. 859, 25 L. R. A. (N. S.) 50 (1909).

<sup>4</sup> *Hayes v. Beardsley*, 136 N. Y. 299, 32 N. E. 855.

<sup>5</sup> *Kuehne v. Union Trust Co.*, 133 Mich. 602, 95 N. W. 715 (1913).

<sup>6</sup> *Corn v. Skillern*, 75 Ark. 148, 87 S. W. 142 (1905).

<sup>7</sup> *Rumble v. Tyus*, 123 Ga. 295, 51 S. E. 420 (1905).

by an officer of a failing bank into a well secured debt is a preference which may be avoided,<sup>8</sup> also a transfer of notes as collateral.<sup>9</sup>

§ 624. **A Lien is not a Wrongful Preference.** — Bank K. agreed with Bank Y. that, if the latter would accept certain drafts, K. would keep on deposit with Y. a sufficient deposit to meet the drafts, and Y. should have a lien on the deposit, and could charge the acceptances to it at any time. Y. knew at the time that K. was embarrassed. K. failed, and Y. immediately charged the acceptances to its account. K.'s assignee sued Y. for the deposit, but the court held that the transaction was not wrongful; the lien was concurrent with the obligation assumed by the Y., and though the act of charging was subsequent to insolvency, it related back to and derived its force from the prior agreement.<sup>1</sup>

When a depositor knows that a bank is insolvent but does nothing except to draw his check and present it for payment in the usual course of business he cannot be required to refund the amount so withdrawn.<sup>2</sup>

§ 625. **Payments by Bank.** — Payment in the ordinary course of business, though after actual insolvency of the bank, is good, its condition being known to the officers, but not to the payee.<sup>1</sup> But if a payment is made, not in the ordinary course of business, when the bank is actually though not avowedly insolvent, the payee cannot hold it, though he was ignorant of the bank's condition, much less when aware of it.<sup>1a</sup> A seeking of the creditor before the debt is due, is not paying in the ordinary course of business.<sup>2</sup>

§ 625 O. **Appointment of Receiver.** — A receiver should not be appointed before notice to the bank of the filing and pendency of an action for his appointment,<sup>1</sup> but in Mississippi a receiver may

<sup>8</sup> *Benedum v. First Citizens' Bank*, 72 W. Va. 124, 78 S. E. 656 (1913).

<sup>9</sup> *Ball v. German Bank*, 187 Fed. 750 (1911).

<sup>1</sup> § 624. *Coats v. Donnell*, 94 N. Y. 168.

<sup>2</sup> *Wilson v. Baker Clothing Co.*, 25 Idaho 378, 137 Pac. 896, 50 L. R. A. (N. S.) 239 (1913). See also *McGregor v. Battle*, 128 Ga. 577, 58 S. E. 28, 13 L. R. A. (N. S.) 185, n. (1907); *Livingstain v. Columbia Banking etc. Co.*, 81 S. C. 244, 62 S. E. 249, 22 L. R. A. (N. S.) 445 (1908).

<sup>1</sup> § 625. See *Dutcher v. Importers & Traders' National Bank*, 59 N. Y. 5; *Belden v. Meeker*, 47 N. Y. 307.

<sup>1a</sup> *McGregor v. Battle*, 128 Ga. 577, 58 S. E. 28, 13 L. R. A. (N. S.) 185, n. (1907).

<sup>2</sup> See *Brouwer v. Harbeck*, 9 N. Y. 589, and cases in note 1.

<sup>1</sup> § 625 O. *Holcomb v. Tierney*, 79 Neb. 660, 113 N. W. 204 (1907); *Olive Hill Imperial Bank v. Commonwealth*, 140 Ky. 210, 130 S. W. 1074 (1910); *People v. Oriental Bank*, 124 App. Div. 741, 109 N. Y. S. 509.

be appointed without notice in an emergency.<sup>2</sup> The appointment is not a judicial act and may be done by the bank commissioners.<sup>3</sup> It is equivalent to an adjudication of insolvency.<sup>30</sup> When a court appoints a receiver it takes complete control over the whole subject of winding up the bank's affairs.<sup>4</sup> The right to secure payment of claims by the usual process of law is suspended, the statute of limitations against ordinary actions has no application and the lapse of time before proceeding against funds in the hands of the receiver is important only as it tends to show laches or unreasonable delay.<sup>4</sup> But it does not preclude depositors from suing directors in deceit in inducing them to make deposits when they knew the bank was insolvent.<sup>40</sup> In Illinois a receiver cannot be appointed until the auditor of public accounts has given the president of the bank or one exercising his duties thirty days notice to make good the impairment of the stock.<sup>5</sup> In Kentucky a receiver may be appointed when the bank becomes insolvent or its capital stock impaired provided thirty days notice has been given.<sup>6</sup> A receiver may be appointed by the federal courts to entertain a suit by non-resident creditors even though the state court has provided a way by statute for winding up the corporation. But after the debts are all paid the receiver in the federal court must turn over the surplus in his hands to the receiver in the state court.<sup>7</sup>

§ 625 A. **Payments after Appointment of Receiver.** — The appointment of a receiver for a national bank does not forfeit the charter, nor work a dissolution of the bank, so as to impair the obligation of a contract to pay rent for the building leased by the bank.<sup>1</sup>

§ 625 B. **Right to sue Bank.** — The general rule is that so long as the corporation over which a receiver has been appointed, has

<sup>2</sup> *Benjamin v. Staples*, 93 Miss. 507, 47 So. 425 (1908).

<sup>3</sup> *Jefferies v. Bacastow*, 90 Kan. 495, 135 Pac. 582 (1913). (State bank.)

<sup>30</sup> *Oates v. Smith*, 176 Ala. 39, 57 So. 438 (1912).

<sup>4</sup> *State v. State Bank*, 84 Kan. 366, 114 Pac. 1074 (1911).

<sup>40</sup> *Blumer v. Ulmer*, 44 So. 161 (Miss.) (1907).

<sup>5</sup> *People v. Milwaukee Ave. State Bank*, 230 Ill. 505, 82 N. E. 853 (1907).

<sup>6</sup> *Imperial Bank v. Commonwealth*, 140 Ky. 260, 130 S. W. 1074 (1910).

<sup>7</sup> *Lyon v. McKeefrey*, 171 Fed. 384 (1909).

<sup>1</sup> § 625 A. *Chemical Bank v. Deposit Co.*, 156 Ill. 522, 41 N. E. 225.

In New York a superintendent of banks who takes charge of a banking institution does so by virtue of his authority under the statute (Consolidated Laws 1909, Ch. 2, § 19), and not as a result of any proceedings in Court. *In re Blough*, 185 Fed. 825 (1911).

not been dissolved and no order of injunction exists restraining suits against it, it may sue and defend in its own name.<sup>1</sup>

§ 625 C. **Removal of a Receiver.** — If a receiver becomes so dissipated as to become incapable of properly attending to his duties he may be removed by the court, and another suitable person appointed.<sup>1</sup> The court has in the meantime a right to administer the funds of the estate,<sup>1</sup> but the management of the affairs of the bank reverts to its directors.<sup>2</sup>

§ 626. **Bona Fide Transactions in Regular Course of Business.** — An executor, who was also cashier of a national bank, purchased certain accepted bills of exchange and paid for them by his check as executor against funds of the estate in the bank. The bills were deposited in the bank in a box with papers of the estate. The bank failing, the receiver claimed the bills as assets of the bank. It was held that the purchase by the cashier was not as agent of the bank, but a *bona fide* purchase as executor, and that it was not in violation of the United States Revised Statutes, § 5242, forbidding the transfer of any bills of exchange owing to a national bank after commission of an act of insolvency; for the paper did not belong to the bank, nor was there a transfer of any deposit to its credit, for the deposit on which the executor drew was to its debit. Nor was the purchase within the spirit of the bankrupt law, though the cashier knew the bank was insolvent. He had hope of its recovery, and at any rate his action was not to avoid the operation of the law, but to secure cash to take up paper held by the bank, and so enable it to stand its examination.<sup>1</sup>

§ 627. **Charter Preferences.** — Sometimes a preference is provided for by the charter, as in favor of deposits of minors, insane persons, or married women. But where the charter provides for such preference in case of "dissolution", a corporation not insolvent in fact, but only unable to realize funds in time to meet its engagements, is not dissolved, and the provision does not apply.<sup>1</sup> In Tennessee bill-holders and holders of certificates of deposit are preferred.<sup>2</sup> (See §§ 655, 656.)

<sup>1</sup> § 625 B. *Warner v. Imbeam*, 63 Kan. 415, 65 Pac. 648.

<sup>1</sup> § 625 C. *Ex parte Faust*, 96 S. C. 411, 81 S. E. 7 (1914).

<sup>2</sup> *People v. Oriental Bank*, 124 App. Div. 741 (1908), 109 N. Y. S. 509.

<sup>1</sup> § 626. *Tuttle v. Frelinghuysen*, 38 N. J. Eq. 12 (1884).

<sup>1</sup> § 627. *Dewey v. St. Albans Trust Co.*, 56 Vt. 476 (1884).

<sup>2</sup> *Moseby v. Williamson*, 5 Heisk. (Tenn.) 278.

The state is preferred when the bank is a state depository,<sup>3</sup> and interest is included.<sup>4</sup>

§ 628. **Liability of Officers for receiving Deposit, knowing of the Insolvency of the Bank.** — In an action under the Missouri statute of 1877, for receiving a deposit knowing the bank to be insolvent or in failing circumstances, the burden is on the officers of the bank to prove ignorance of the insolvency.<sup>1</sup>

And, in the same State, it is a felony for an officer of a banking institution to receive or to assent to the receiving of deposits when such officer knows the insolvent condition of the bank.<sup>1a</sup>

<sup>3</sup> *Booth v. State*, 131 Ga. 750, 63 S. E. 502 (1908); *id.*, 134 Ga. 163, 67 S. E. 803.

<sup>4</sup> *Central Bank v. State*, 139 Ga. 54, 76 S. E. 587 (1912).

<sup>1</sup> § 628. *Dodge v. Mastin*, 5 McCrary 404.

<sup>1a</sup> *State v. Buck*, 108 Mo. 622, 18 S. W. 1113; *State v. Sattley*, 131 Mo. 465, 33 S. W. 41. See also *State v. Smith*, 91 Ark. 1, 120 S. W. 156 (1909); *Davey v. State*, 99 Ark. 547, 139 S. W. 629 (1911), holding it immaterial that the bank was not organized under the laws of Arkansas; *Morris v. State*, 102 Ark. 513, 145 S. W. 213 (1912); *State v. Cramer*, 20 Idaho 639, 119 Pac. 30 (1911); *Toovey v. Aythart*, 136 Iowa 694, 114 N. W. 181 (1907); *Parrish v. Commonwealth*, 136 Ky. 77, 123 S. W. 339 (1909); *Cartwell v. Commercial Bank*, 153 Ky. 798, 156 S. W. 1048 (1913); *State v. Hoffman*, 120 La. 949, 45 So. 951 (1908), showing that it is not necessary that the officer have charter authority to assent to the deposit; *State v. Buhler*, 132 La. 1065, 62 So. 145 (1913), holding that there is no necessity for special, open and direct assent; *State v. Leland*, 91 Minn. 321, 98 N. W. 92 (1904); *State v. Walker*, 88 Miss. 592, 41 So. 8 (1906); *Stewart v. State*, 95 Miss. 627, 49 So. 615 (1909); *State v. Mitchell*, 96 Miss. 259, 51 So. 4 (1909), it is no defence that the director did not personally receive the money if, knowing of the bank's insolvency, he kept it open for deposits; *State v. Traylor*, 100 Miss. 544, 56 So. 521 (1911); *State v. Rowles*, 103 Miss. 806, 60 So. 782 (1912); *In re Wisner*, 36 Mont. 298, 92 Pac. 958 (1907), the code does not apply to a private banker; *Ex parte Pittman*, 31 Nev. 43, 99 Pac. 700 (1909). The word "receives" cannot be construed as "assent to reception." *Ex parte Riekey*, 31 Nev. 82, 100 Pac. 134 (1909); and under Sts. 1909, c. 92, the word "assent" implies permission, and presupposes some inherent power to withhold assent. *Ex parte Smith*, 33 Nev. 466, 111 Pac. 930 (1910); *Eureka Bank Cases*, 35 Nev. 80, 126 Pac. 655; *State v. Stevens*, 16 S. D. 309, 92 N. W. 420 (1902), showing what is proper to be admitted in evidence; *Hall v. Baker*, 66 App. Div. 131 (1901), does not apply to a private banker; *Boynton v. Commonwealth*, 114 Va. 841, 76 S. E. 945 (1913); *State v. Youngbluth*, 60 Wash. 383, 111 Pac. 240 (1910), the act does not apply to a private banker; *State v. Furth*, 82 Wash. 665, 144 Pac. 907 (1914), showing that the statute is restricted to those who have direct connections with the bank which receives the money, and that one not so connected cannot be prosecuted as an aider or abettor; *Ellis v. State*, 138 Wis. 513, 119 N. W. 1110 (1909), if the officer has good reason to know that the bank is insolvent he may be indicted; *Easton v. Iowa*, 188 U. S. 220, 47 L. ed. 452, 23 Sup. Ct. 288 (1903).

(a) "Any bank officer who violates the provisions of § 918, Revised Statutes, by receiving deposits for his bank, or by assenting to the same, with knowledge that the bank is insolvent, or in failing circumstances, is individually responsible for such deposits so received, and the depositor may maintain an action against such officer for the amount of his deposit."<sup>2</sup>

(b) The mere fact that one deposited money in an insolvent bank, believing it to be solvent, and thereby lost it, gives him no cause of action at common law against the directors.<sup>3</sup> Mere evidence that a banker knew himself to be insolvent when he received a deposit, does not establish fraud for which the depositor may maintain an action to recover the amount notwithstanding the banker's discharge in bankruptcy.<sup>4</sup>

In Illinois and Indiana failure or suspension within thirty days of the receiving of a deposit is *prima facie* evidence to defraud.<sup>5</sup>

In Kansas it is held that one cannot be convicted for receiving deposits as an officer of an insolvent bank in the absence of a showing that he actually knew of the insolvency.<sup>6</sup>

In Missouri it is error to rule the law presumes that a member of a banking firm knew the condition of the bank at the time the money was received,<sup>6a</sup> but failure of the bank shall be *prima facie* evidence of knowledge that it was insolvent when the money or property was received.<sup>6b</sup>

In Minnesota there is a rebuttal presumption of fact that the condition of the bank was known when the money was received.<sup>6b</sup> But it is error to instruct the jury that if defendant had reason to believe that the bank was insolvent an indictment might be maintained.<sup>6c</sup>

<sup>2</sup> *Cummings v. Winn*, 89 Mo. 51, 14 S. W. 512 (1886).

<sup>3</sup> *Duffy v. Byrne*, 7 Mo. App. 417 (1879).

<sup>4</sup> *Sheldon v. Clews*, 13 Abb. N. C. 40 (N. Y.) (1883).

<sup>5</sup> *Trust and Savings Bank v. Manufacturing Co.*, 150 Ill. 336, 37 N. E. 227; *Meadowcroft v. People*, 163 Ill. 56, 45 N. E. 303; *Brown v. People*, 173 Ill. 34, 50 N. E. 106; *Jernberg v. Mix*, 100 Ill. App. 264 (1902); *State v. Krasher*, 170 Ind. 43, 83 N. E. 498 (1907).

<sup>6</sup> *State v. Tomblin*, 48 Pac. 144. See also *Parrish v. Commonwealth*, 136 Ky. 77, 123 S. W. 339 (1909); *State v. Darragh*, 152 Mo. 522, 54 S. W. 226; *Utley v. Hill*, 155 Mo. 232, 55 S. W. 1091; *State v. Dunning*, 130 Iowa 678, 107 N. W. 927 (1906); *Boynton v. Commonwealth*, 114 Va. 841, 76 S. E. 945 (1913).

<sup>6a</sup> *State v. Salmon*, 216 Mo. 466, 115 S. W. 1106 (1909).

<sup>6b</sup> *State v. Quackenbush*, 98 Minn. 515, 108 N. W. 953 (1906); *State v. Strait*, 99 Minn. 327, 109 N. W. 598 (1906).

<sup>6c</sup> *State v. Drew*, 110 Minn. 247, 124 N. W. 1091 (1910).



In Georgia the fact that the assistant cashier of an insolvent bank *was bound to know* that the bank was insolvent when the plaintiff purchased certain drafts from it, and did not inform the plaintiff of such insolvency, does not render the cashier liable as for a fraud.<sup>7</sup>

In Indiana it is embezzlement for an insolvent bank <sup>7a</sup> or banker to fraudulently receive deposits from any one not indebted to it or him,<sup>8</sup> when the deposit so made is lost to the depositor.<sup>8a</sup>

In Minnesota the directors of a bank, accepting through its teller a deposit, knowing the bank to be insolvent, are liable to a depositor ignorant of such insolvency. The act of the teller in such a case is considered the act of the directors.<sup>9</sup>

A similar view is taken by the Iowa and Wisconsin courts.<sup>10</sup> It is also held in Iowa that it is a felony to receive deposits with knowledge that the bank is insolvent.<sup>11</sup> And it is no defence that the deposit thus fraudulently obtained may be recovered as a trust fund.<sup>12</sup>

§ 629. **Recovery of Deposit.**— In case of a general deposit made before formal insolvency there can be no recovery in preference to the other creditors unless the deposit was kept separate, and not *fully received before formal insolvency*, or the receiving was under circumstances amounting to fraud on the part of the bank. When money is paid in by a customer after banking hours, and is put in a place by itself, and not entered in the regular books of the bank, and the bank fails and does not open on the next day, the necessity of failing having been already agreed upon by all the partners, the customer may reclaim his deposit and hold it as against the assignee of the bankrupt.<sup>1</sup> Though

<sup>7</sup> Dickey and Company v. Leonard, 77 Ga. 154.

<sup>7a</sup> If the bank consists of a partnership the indictment must allege that the partners were insolvent. State v. Krasher, 170 Ind. 43, 83 N. E. 498 (1907); Meadowcraft v. People, 163 Ill. 56, 45 N. E. 303, 54 Am. St. Rep. 447, 35 L. R. A. 176 (1896).

<sup>8</sup> State v. Beach, 43 N. E. 949.

<sup>8a</sup> State v. Krasher, 170 Ind. 43, 83 N. E. 498 (1908).

<sup>9</sup> Baxter v. Coughlin, 70 Minn. 1, 72 N. W. 797 (1897).

<sup>10</sup> State v. Yetser, 97 Iowa 423, 66 N. W. 737; Hyland v. Roe, 111 Wis. 361, 87 N. W. 252, 87 Am. St. Rep. 873 (1901).

<sup>11</sup> State v. Boomer, 103 Iowa 106, 72 N. W. 424.

<sup>12</sup> State v. Eifert, 102 Iowa 188, 65 N. W. 309, 71 N. W. 248.

<sup>1</sup> § 629. Threlfal v. Giles, cited 2 M. & Rob. 492; Sadler v. Belcher, *id.* 489; American Exchange National Bank v. Mining Company, 165 Ill. 103, 46 N. E. 202; Hyland v. Roe, 111 Wis. 361, 87 N. W. 252, 87 Am. St. Rep. 873 (1901).

in another case, wherein it was shown that the bankers were in the habit of receiving, and the customer was in the habit of making, deposits after banking hours, and that such deposits were always regarded and treated by both parties as if regularly made during banking hours, and the bankers had not determined upon the necessity of failing when the deposit was made, a contrary decision was reached.<sup>2</sup>

In this case there was no fraud imputed to the bank, and the deposit was fully received in the usual manner, before formal insolvency occurred. Mere knowledge of insolvency is not a sufficient ground for recovery; the title passes to the bank unless there is a fraud, or the deposit is kept separate, with intent that the title shall not pass. (§ 589.)

In Illinois it is held that when a banker fraudulently receives a check for deposit when insolvent, and the proceeds of the check are mingled with the common mass of funds of the banker and its identity lost, the depositor does not become a preferred creditor for the amount of the check on the subsequent assignment of the banker.<sup>2a</sup>

And in Nebraska although the deposit is obtained by fraud the depositor does not become a preferred creditor if the deposit has become commingled with the general assets of the bank.<sup>2b</sup>

In Georgia where one intending to become a depositor in a bank makes no inquiry as to its solvency and is not induced to make the deposit by any statement made by the officer, he is in no better position than any other person who deals with an insolvent under the impression that he is solvent.<sup>2c</sup> But in Iowa if a bank sells a draft on its correspondent well knowing at the time that there is

<sup>2</sup> *Ex parte Clutton*, 1 Fonb. 167.

<sup>2a</sup> *Lauterman v. Travous*, 174 Ill. 459, 51 N. E. 805.

<sup>2b</sup> *Higgins v. Hayden*, 53 Neb. 61, 73 N. W. 280; *Wilson v. Coburn*, 35 Neb. 530, 53 N. W. 466. See *Orme v. Baker*, 74 Ohio St. 337, 78 N. E. 439, 113 Am. St. Rep. 968 (1906); *Covey v. Cannon*, 104 Ark. 550, 149 S. W. 514 (1912); *Hyland v. Roe*, 111 Wis. 361, 87 N. W. 252, 87 Am. St. Rep. 873 (1901).

A later case has held that so long as trust property in any shape or form can be recognized it belongs to the *cestui que* trust who in order to obtain a preference must show that the estate out of which he claims such preference has been increased to some extent by the misappropriation of the trust property, and he is entitled to a preference only to the extent of such increase. *Lincoln v. Morrison*, 64 Neb. 822, 90 N. W. 905, 57 L. R. A. 885 (1902).

<sup>2c</sup> *McGregor v. Battle*, 128 Ga. 577, 58 S. E. 28, 13 L. R. A. (N. S.) 185, n. (1907).

no money with which to pay the draft, or mingles money which was deposited to be applied upon a particular note with its general funds, the depositor becomes a preferred creditor upon the insolvency of the bank.<sup>2d</sup>

Section 573 of the Civil Code of California gives a preference to all depositors who are not stockholders to those who are stockholders, but this does not give a depositor in the savings department a preference over a depositor in the commercial department, nor can the savings depositors contract for a preference over commercial depositors without the knowledge and consent of the latter.<sup>2e</sup>

In Oklahoma when a deposit is made of currency and checks on other banks two and one half hours before the bank closes its doors, the depositor is preferred as to the currency even though it was mingled with the general assets of the bank, but he is not entitled to a preference as to the checks which have been used by the clearing house to pay an existing debt and which did not swell the assets of the bank.<sup>2f</sup> And if the deposit is made on the day before the last day the bank received deposits, the amount deposited on the last day must be deducted from the amount of money in the bank when it closes, and the depositor is limited to the remainder on which to charge a preference.<sup>2g</sup>

### *Insolvent Bank Liable for receiving Deposit*

(a) A banker must not receive deposits if he knows himself to be hopelessly insolvent, and the mere promise of another to carry him through, without security, is not sufficient basis on which to do business. The question for the jury is whether the banker was honest. It is not necessary that he should make misrepresentations. If he knows himself to be irremediably insolvent, he must disclose his situation before receiving a deposit.<sup>2h</sup>

<sup>2d</sup> Whitcomb v. Carpenter, 134 Iowa 227, 111 N. W. 825, 10 L. R. A. (N. S.) 928, n. (1907).

<sup>2e</sup> People v. California Safe etc. Co., 160 Cal. 374, 117 Pac. 321 (1911).

<sup>2f</sup> Willoughby v. Weinberger, 15 Okla. 222, 79 Pac. 777 (1905).

<sup>2g</sup> Cherry v. Territory, 17 Okla. 213, 89 Pac. 190, 192 (1906).

<sup>2h</sup> If a deposit is received when the banker knows he is insolvent it is a fraud, and a trust is impressed upon the funds. *In re Silver*, 208 Fed. 797 (1912); *Pennington v. Third National Bank*, 114 Va. 674, 77 S. E. 455, 45 L. R. A. (N. S.) 781, n. (1913).

If an officer of a bank participates in the receipt of a deposit after he has knowledge that the bank is insolvent he is guilty of fraud and liable for the loss sustained, and it is not essential that he have bad faith or do

*Quinn v. Earle*<sup>2</sup> holds that where a deposit is reclaimed on the ground of fraud, *i.e.*, that the officers knew or believed the bank to be insolvent at the time such deposit was made, the fraud must be proved. It is not to be presumed and the burden is on the depositor.

The mere fact of insolvency does not make it dishonest to receive a deposit or justify a finding of fraud<sup>2i</sup> but hopeless insolvency does. It is fraud to take money that you know you will not be able to repay.<sup>3</sup> Under § 2814 of the Code [receiving a deposit, knowing or having reason to believe the bank insolvent, and without informing the depositor], is a crime, no matter what may be the purpose or hope of the person receiving it; it is for the protection of the public, and the bankrupt cannot say he received the deposit hoping to pull through. But in case of an attachment by such depositor to recover as for a debt fraudulently contracted, the bracketed facts are not conclusive of fraud, but are circumstances for the jury in considering the question of fraudulent intent on the part of the bankrupt. "It is impossible to conceive of fraudulently contracting a debt, without ascribing to the debtor the purpose to defraud."<sup>4</sup> A general deposit of trust money stands on a level with other deposits in case of insolvency of the bank.<sup>5</sup>

If a depositor files his claim with the trustee in insolvency he waives a right to claim that the deposit was accepted by the bank with the knowledge of its insolvency,<sup>5a</sup> or if he sues to recover the amount of discounted drafts placed on deposit he has made an election and cannot subsequently recover the amount of the drafts any intentional wrong. *Nathan v. Uhlmann*, 101 App. Div. 388 (1905), 92 N. Y. S. 13; affirmed in 184 N. Y. 606, 77 N. E. 1192 (1906). The right of action is based on fraud and in order to establish it the insolvency must be of such a character that it is manifestly impossible for the bank to continue in business and meet its obligations, and such a condition must have been known to the banker. *Williams v. Van Norden Tr. Co.*, 104 App. Div. 251 (1905), 93 N. Y. S. 821.

<sup>2i</sup> 95 Fed. 728 (1899); *Furber v. Dane*, 204 Mass. 412, 90 N. E. 859, 27 L. R. A. (N. S.) 808, n. (1910).

<sup>2j</sup> *Williams v. Van Norden Tr. Co.*, 104 App. Div. 251 (1905), 93 N. Y. S. 821.

<sup>3</sup> *Rochester Printing Co. v. Loomis*, 45 Hun (N. Y.) 93; *Williams v. Cox*, 99 Tenn. 403, 42 S. W. 3; *Brennan v. Tillinghast*, 201 Fed. 609 (1913); *Wedman v. Kellogg*, 22 N. D. 396, 133 N. W. 1020, 39 L. R. A. (N. S.) 563 (1911).

<sup>4</sup> *Hughes v. Lake*, 63 Miss. 557.

<sup>5</sup> *Fletcher v. Sharpe*, 108 Ind. 276, 9 N. E. 142.

<sup>5a</sup> *Potts v. Schumucker*, 84 Md. 535, 36 Atl. 592.

on the ground that the bank's officers obtained them by fraud.<sup>5b</sup>

Where the bank received two drafts, one for \$1,225.98 and the other for \$1,018.81, the proceeds of which were to be applied in payment of an overdraft by the sender for \$1,749.79, and the balance \$495 placed to his credit, the failure of the bank to disclose its insolvency rendered its title to the balance, \$495, defective.<sup>5c</sup>

*When Bank is Trustee and Funds are Mingled, no Preference.  
Duty as Trustee*

(b) A deposit was made on condition that the bank would pay a certain sum to a widow during her life, the remaining income, if any, to go to her children. The bank had power by charter to accept and execute trusts, but no preference of such trusts was declared in the organic law; and upon failure of the bank, the Chancellor held: "If it be admitted that the money in question was received by the institution on a trust, the right of the complainants to a decree directing payment of the fund out of the assets of the institution in preference to the claims of other depositors would not be apparent. If it received the money to hold it in trust, it was clearly its duty to observe its obligations as trustee, among which was that of keeping the funds and investment separate, so that they might be identified and capable of specific claim on the part of the beneficiaries; and if, neglecting or disregarding its duty in that respect, it mingled the funds of the trust indistinguishably with those of depositors, the right of the complainants to indemnity in preference to the claims of the depositors would be questionable at least. But the evidence does not establish the existence of any trust different from that on which general deposits were held."<sup>6</sup>

When a fiancée of the cashier of a bank deposits her collateral as security for a loan to the bank which is hopelessly insolvent, she, in the absence of information of the bank's condition, may recover the amount she paid to redeem the securities, as a preferred claim.<sup>7</sup> But she cannot recover interest therefor.<sup>8</sup>

<sup>5b</sup> Davis v. Butters Lumber Co., 132 N. C. 233, 43 S. E. 650 (1903).

<sup>5c</sup> Spring Brook Chemical Co. v. Dunn, 39 App. Div. (Hun, N. Y.) 130.

<sup>6</sup> Vail v. Newark Savings Institution, 32 N. J. Eq. 631 (1880).

<sup>7</sup> Hallett v. Fish, 120 Fed. 986 (1903).

<sup>8</sup> Hallett v. Fish, 123 Fed. 201 (1903).

When a receiver is appointed at the instance of a creditor in an action brought on behalf of himself and all other creditors to take charge of the assets of an insolvent bank, a creditor who has deposited money in the bank but has received no credit therefor cannot sue the receiver to recover the deposit; his remedy is to file his petition in the original cause.<sup>9</sup>

§ 629 A. **Proof of Claim.** — A creditor of an insolvent national bank is entitled to prove the whole amount of his claims against such bank, without reference to the collateral held to secure such claims.<sup>1</sup>

§ 630. **Special and Specific Deposits.** — Special and specific deposits, if actually kept separate so that they can be identified, may be reclaimed. The bank had no title and its creditors can have none.<sup>0</sup> But if such deposits are mingled indistinguishably with the bank's funds, the ground of preference fails; <sup>a</sup> the owner

<sup>9</sup> Crutehfield v. Hunter, 138 N. C. 54, 50 S. E. 577 (1905).

If money cannot be traced into the hands of the receiver there can be no preference. Empire State Surety Co. v. Carroll County, 194 Fed. 593 (1912).

In order to pay a depositor, an insolvent bank draws a draft on a bank in which it had on deposit the proceeds of a note secured by collateral. The note provided that in case of insolvency of the maker bank it should become due at once and the note could be charged to the account and the collateral sold and applied to the debt. On notice of insolvency of the maker, the drawee bank so charged the note and refused to pay the draft, but turned it over to the receiver of the insolvent bank. Under such circumstances the holder is not entitled to be subrogated to the rights of the drawee bank as against general creditors of the drawer bank. Livingstain v. Columbian Banking Co., 77 S. C. 305, 57 S. E. 182, 128 Am. St. Rep. 568, 5 L. R. A. (N. S.) 442. But when a depositor withdrew his money from a bank in consequence of insolvency but immediately and *bona fide* used the same to purchase from the bank a draft on its correspondent bank, as in case *supra*, the money was not impressed with a trust when withdrawn, and the holder of the draft is entitled to be subrogated to the rights of the drawee in the collateral held by it. *Ex parte* Berger, 81 S. C. 244, 62 S. E. 249 (1908).

<sup>1</sup> § 629 A. Merrill v. First National Bank, 75 Fed. 148. See Commercial Savings Bank v. Jenks Lumber Co., 194 Fed. 732 (1911).

And if the receiver collects sufficient assets to pay the claims of all creditors in full, and interest on the same, interest at the legal rate may be recovered before the surplus is paid to stockholders. People v. Merchants' Trust Co., 116 App. Div. 41 (1906), 101 N. Y. S. 255.

<sup>0</sup> § 630. Capital National Bank v. Coldwater National Bank, 69 N. W. 115; Vail v. Newark Savings Institution, 32 N. J. Eq. 631; Woodhouse v. Crandall, 197 Ill. 104, 64 N. E. 292, 58 L. R. A. 385 (1902).

<sup>a</sup> If the *fund* can be identified it may be recovered even though the money cannot be identified. Woodhouse v. Crandall, 197 Ill. 104, 64 N. E. 292, 58 L. R. A. 385 (1902).

simply has a claim against the bank for damages, and should not be preferred to other creditors. (§ 589 b.) It is a case in which equality is equity.<sup>1</sup>

### *Proceeds of Collection*

Two banks kept a running account, each acting as collecting agent for the other. Each week a balance was struck and remitted. The avails of these collections were never kept separate from the other funds of the bank or distinguished therefrom in any way. *Held*, that their relation was simply that of debtor and creditor, and upon the failure of one the other acquired no lien on any specific fund, nor any preference over creditors generally.<sup>2</sup> The depositor of money for a specific purpose can claim no preference in case of the bank's insolvency.<sup>3</sup> The contrary, though less reasonable, is more frequently held. (§ 567 a, b, and § 568 d.)

One who indorses a draft and deposits it with a bank which at the time is known to its officers to be hopelessly insolvent may, in order to protect himself, on discovering the insolvency, rescind the transfer and stop payment of the paper.<sup>4</sup>

§ 631. **Money of Others received by the Bank after Formal Insolvency may be recovered in full, if their Ownership is Determinable.** — Money received upon collections subsequent to formal insolvency belongs to the owner of the paper, and can be recovered in full if the said money can be traced to the particular paper;<sup>1</sup> but if this is impossible, as if a correspondent collects a mass of paper for the failing bank before its insolvency, and remits part of the proceeds before the insolvency and a part afterwards, not having kept the proceeds of the various notes separate, none of the owners of the paper so collected could trace the proceeds of his own paper into the fund transmitted after insolvency, and all should take equally.

In Ohio, a case arose in which it appeared that the transmitting bank was accustomed to forward a considerable amount of paper to the collecting bank for collection. Soon after the plaintiff's draft was forwarded, the first bank failed. Prior to its failure

<sup>1</sup> *Vail v. Newark Savings Institution*, 34 N. J. Eq. 627.

<sup>2</sup> *People v. City Bank of Rochester*, 93 N. Y. 582.

<sup>3</sup> *Brandywine Bank's Assigned Estate*, 1 Chester Co. 431; *Parkesburg Bank's Appeal*, 6 W. N. Cas. (Phila.) 394.

<sup>4</sup> *Bank of Meridian v. Strauss*, 66 Miss. 484.

<sup>1</sup> § 631. *Havens' Petition*, 8 Bened. 309; *Montagu v. Pacific Bank*, 81 Fed. 602 (1897).

the second bank had made a large number of collections for it, and had remitted to it various sums on account of these, and after the insolvency had paid over the balance remaining due on account of all the collections to the assignee in insolvency. It was held that the owner of the draft in question had no specific lien on the funds of the insolvent bank, in the hands of the assignee, to give him a preference over the other creditors; but that he must prove his claim and take his dividend like the rest.<sup>2</sup> It was impossible to prove that any part of the balance at the time of the insolvency arose from the particular draft of the plaintiff.

Paper sent by N. B. to its correspondent W. indorsed "for collection for account of N. B.", does not become the property of W.; and any such paper remaining uncollected at the time of W.'s insolvency belongs to N. B., and does not pass to the assignee. But the proceeds of such paper collected by W. before the assignment becomes the property of W., and in respect to such proceeds N. B. has no more rights than the other creditors of W.<sup>3</sup>

§ 632. **Insolvency of a Savings Bank.** — The creditors of a savings bank are to be paid in full, in preference to depositors.<sup>1</sup>

*Depositor no Off-set in Case Bank is Insolvent*

(a) A savings bank is an institution for the receiving of deposits to be invested for the benefit of the depositor, not that of

<sup>2</sup> Reeves v. State Bank, 8 Ohio St. 465.

<sup>3</sup> National Butchers and Drovers' Bank v. Hubbell, 117 N. Y. 384, 22 N. E. 1031.

<sup>1</sup> § 632. People v. Mechanics & Traders' Savings Institution, 28 Hun (N. Y.) 375; Huntington v. Savings Bank, 96 U. S. 388, 24 L. ed. 777; People v. Security Life Ins. Co., 78 N. Y. 122.

In case of insolvency, depositors are creditors of the corporation. Barrett v. Bloomfield Savings Inst., 64 N. J. Eq. 425, 54 Atl. 543 (1903), affirmed in 66 N. J. Eq. 431, 57 Atl. 1131.

In Iowa, depositors are by statute given a preference. State v. Corning Savings Bank, 139 Iowa 338, 115 N. W. 937 (1908).

In Colorado, savings depositors are by statute preferred over all other creditors, and in this respect the holders of time certificates are savings depositors. But depositors in an association organized for the mutual benefit of its members are not preferred even though they thought when they made the deposit that it was a savings bank but who must have known upon the receipt of the pass book that it was not such a bank. Tabor v. Mullin, 37 Colo. 399, 86 Pac. 1007 (1906).

In Florida, a depositor is entitled to have his deposit credited on his note held by the bank; but the deposits of others purchased by him after the bank's insolvency cannot be so credited. Depositors in savings banks are creditors of the bank and have the same rights as depositors in other banks. Robinson v. Aird, 43 Fla. 30, 29 So. 633 (1901).



the corporation, as in the case of a commercial bank. The increase and the original all belong to the depositor after deducting necessary expenses of management, and if the deposit is lost, it is the loss of the depositor, and he cannot in case of insolvency offset a debt due from him to the bank against such loss,<sup>2</sup> any more than any principal can offset a debt due to A. against funds that he put into A.'s hands as his agent to invest to the best of his discretion, and which have been lost. The principal has no claim against the agent for the loss of the funds, while the agent has a valid claim for the debt due to him from the principal.

(b) But a special deposit that can be withdrawn on call may be offset,<sup>3</sup> and so may a specific deposit made for the very purpose of being applied to the depositor's debt to the bank, if the bank officers knew of such purpose, though insolvency occurred before the money was formally applied to the debt.<sup>4</sup>

### *Fraudulent Transfer of Bank's Assets*

(c) An agreement by a savings bank to hold the deposit of one party as security for the overdrafts of another was held not enforceable by the debtor after the insolvency of the bank; this would indirectly contravene the New York Revised Statutes (6th ed.), c. 399, § 4, prohibiting fraudulent transfers of the effects of insolvent corporations.<sup>5</sup> The agreement did not make it obligatory at any time upon the bank to apply the deposit to the overdraft; it had the liberty of so doing, but on approach of insolvency it was its clear duty not to do so.

### *So called "Special Deposits" not Preferred*

(d) A New Jersey savings bank received two kinds of deposits; the first class were payable at thirty days' notice, the second were to be paid without any notice, did not participate in the profits as the first class did, and were called "special deposits." It was held that these specials were not entitled to preference; they

<sup>2</sup> Osborn v. Byrne, 43 Conn. 155 (1875); Stockton v. Mechanics & Laborers' Savings Bank, 32 N. J. Eq. 163; Sawyer v. Hoag, 17 Wall. 610, 21 L. ed. 731; Hall v. Harris, 59 N. H. 71; Railroad Co. v. Howard, 7 Wall. 392, 19 L. ed. 117; United States v. Eckford, 6 Wall. 484, 18 L. ed. 920. See Lippitt v. Thames L. T. Co., 88 Conn. 185, 90 Atl. 369 (1914).

<sup>3</sup> Hall v. Harris, 59 N. H. 71.

<sup>4</sup> Osborn v. Byrne, 43 Conn. 155.

<sup>5</sup> Van Dyck v. McQuade, 18 Hun (N. Y.) 376.

were mingled with the general funds of the bank, and were more like the general deposits of a commercial bank than true special deposits.<sup>6</sup>

*Debts Preferred to Deposits*

(e) The court held in this case that debts and expenses contracted by the bank in its ordinary business should be preferred to the depositors, who held the position of stockholders.

*Checks Preferred, Except those to Depositors for their Deposits*

(f) Also, that money paid the bank for its check, which was dishonored, presumably went into the funds, and the holders should be preferred; but that checks given to depositors on account of their deposits were not to be preferred.<sup>6</sup>

(g) When a savings bank goes into liquidation and turns over its assets to another incorporated bank which agrees to pay the creditors and stockholders of the former but goes into insolvency before making such payment, a creditor of the liquidating bank has a lien on the assets of such bank in the possession of the receiver prior to that of the creditors of the purchasing bank.<sup>7</sup>

(h) An order permitting the sale of the charter of an insolvent savings bank is against public policy, since it would sanction the bank's continued existence after the discharge of the receiver and adjudicate that such existence should not be terminated by the judgment to be entered.<sup>8</sup>

(i) The money which the sureties of a defaulting treasurer has been compelled to pay is an asset of the bank and belongs to the

<sup>6</sup> *Stockton v. Mechanics & Laborers' Savings Bank*, 32 N. J. Eq. 163.

In California savings depositors are not, by § 573 of the civil code, preferred to commercial depositors in a bank doing both kinds of business. *People v. California Safe etc. Co.*, 160 Cal. 374, 117 Pac. 321 (1911).

In New Hampshire when a bank has "general depositors" and "special depositors for a guaranty fund" the general depositors stand as creditors. *Bank Commissioners v. N. H. Banking Co.*, 74 N. H. 292, 67 Atl. 583 (1907); and upon the insolvency of a corporation authorized to do a general banking and savings bank business, the depositors in the savings department, as well as the holders of debenture bonds, are entitled to share with the unsecured creditors in the distribution of the unpledged assets. *Bank Commissioners v. Security Trust Co.*, 75 N. H. 107, 71 Atl. 377 (1908). See *Peters v. Union Trust Co.*, 131 Mich. 322, 91 N. W. 273 (1902).

<sup>7</sup> *Ex parte Savings Bank*, 73 S. C. 393, 53 S. E. 614, 5 L. R. A. (N. S.) 520, n. (1905).

<sup>8</sup> *State v. Savings Bank*, 102 Minn. 199, 113 N. W. 268 (1907).

depositor,<sup>9</sup> and a presentation of the bank book to the receiver showing non-payment of interest is a presentation of such claim.<sup>9</sup>

§ 632 A. **Insolvency of a Trust, Loan or Investment Company.** — When a trust company becomes insolvent and it can no longer be conducted profitably or serve the purpose of its creation, its directors and stockholders may file a bill to have a receiver appointed and its affairs taken charge of by a court of equity in order to protect the rights of all concerned.<sup>1</sup> But under the statute in Missouri, stockholders cannot take proceedings for the appointment of a receiver to wind up the affairs of the trust company.<sup>2</sup>

(a) **Jurisdiction.** — In Pennsylvania the Attorney General is authorized by statute to institute suit for winding up the affairs of an insolvent trust company ;<sup>3</sup> such a statute, however, did not impair the jurisdiction of the federal courts to entertain a suit by non-resident creditors of a trust company doing a banking business and unable to pay its debts as they matured, for the liquidation of its assets and an application thereof to its debts through the agency of a receiver.<sup>3</sup> But where pending suit for the administration of the affairs of a trust company which is unable to pay its debts as they mature, the Attorney General under a statute obtains a decree dissolving the corporation and appointing a receiver, and all purposes for which the federal courts' jurisdiction was invoked, having been subserved on the payment in full of all of the debts of the corporation, the federal court cannot then return a surplus in the hands of its receiver, either to the corporation or to its stockholders, but is bound to turn it over to the receiver appointed in the dissolution proceedings in the state court, for distribution.<sup>3</sup>

(b) **Construction of By-laws.** — Where the by-laws of an investment company provided that a surplus fund, consisting of five per cent of the weekly collections or dues, should be used or invested as the directors might elect for the best interest of the

<sup>9</sup> Bank Commissioners *v.* Watertown Savings Bank, 81 Conn. 261, 70 Atl. 1038 (1908).

When a statute provides that claims not presented to the commissioners to wind up a savings bank within the time fixed by the court shall be forever barred, it does not prevent the allowance of a claim presented within an extension of time for presenting claims. *In re Nutter*, 109 Me. 124, 82 Atl. 1012 (1912).

<sup>1</sup> § 632 A. *Camden v. Virginia Safe Deposit etc. Corp.*, 115 Va. 207, 28 S. E. 596 (1913).

<sup>2</sup> *Coch v. Missouri-Lincoln Trust Co.*, 181 S. W. 44 (Mo.) (1915).

<sup>3</sup> *Lyon v. McKeefrey*, 171 Fed. 384 (1909).

company, and an expense fund, consisting of ten per cent of the weekly collections and dues and transfer fees, should be used for current and such other expenses as the directors might direct, such by-laws did not authorize the directors of the corporation, while it was insolvent, to distribute dividends from such funds as against the creditors of the corporation.<sup>4</sup>

(c) **Construction of Agreement.** — Where a trust agreement under which a loan company deposited securities with the trustee to secure its debentures provided that in case of default in the payment of any debenture bond or the interest thereon the trustee should proceed to collect or sell the securities pledged, and to apply the proceeds in payment of the debentures, and that any claim of the trustee for the costs of such collection or sale should not be a lien upon the securities, but should be against the loan company only, such agreement did not contemplate the general insolvency of the loan company and that while, therefore, the trustee could not be compelled in such contingency to collect the securities at its own cost, neither was it authorized thereby to make such collection where a receiver had been appointed to administer the estate of the insolvent.<sup>5</sup>

(d) **Right of Intervention by Debenture Holders.** — Where a trust company holding securities for a loan company in trust to secure its debentures petitioned the court in insolvency proceedings against the loan company asking an order permitting it to collect or sell the securities in its hands, and that its costs and expenses be made a charge against the fund realized, the debenture holders who deny its right, under the trust agreement to so charge the costs and expenses are entitled to intervene and contest such application.<sup>5</sup>

(e) **Construction of Statute.** — A statute which provides that on the failure of any investment company required to deposit with the state treasurer cash or securities the court shall appoint a receiver, who shall liquidate the debts and distribute the assets, using therefor, by the order of the court, the deposits previously made by the treasurer, does not authorize the court after appointing a receiver for the company, and before the adjudication of any debt against it, to compel the controller to issue a warrant in favor of the receiver on the treasurer for the money and securities deposited by the company.<sup>6</sup>

<sup>4</sup> *Taylor v. Commonwealth*, 119 Ky. 731, 75 S. W. 244 (1903).

<sup>5</sup> *Girard Trust Co. v. McKinley-Lanning etc. Co.*, 135 Fed. 180 (1905).

<sup>6</sup> *Ex parte Stephens*, 100 Tex. 107, 94 S. W. 327 (1906).

(f) **Purchase of Assets.** — Where the commissioner of banking in a foreign state sold the assets of an insolvent trust company to a corporation organized to take over its business, the purchasing corporation has the same right to recover the assets of the insolvent company held by a domestic bank and which had been attached by a domestic assignee of one of the trust companies' creditors, that the commissioner would have had.<sup>7</sup>

(g) **Preferences.** — Depositors in a trust company are sometimes given a preference, by statute.<sup>8</sup> It is held in New York that all preferences should be resisted by the public authorities, and, except when statutory, should be disposed of by the court on the principle that equality is equity.<sup>9</sup> Even in respect to trust funds, if they cannot be traced, ascertained and identified there can be no preferences.<sup>10</sup> Nor can there be a preference in respect to money received by a trustee or receiver in bankruptcy and deposited with the understanding that it is subject to check, with a trust company which is a depository designated by the state comptroller.<sup>11</sup>

(h) **Set-off.** — In Connecticut, it is held that a set-off cannot be allowed in distributing the assets of an insolvent trust company where its allowance will destroy the order or equality of distribution provided by statute.<sup>12</sup> In California, when the administrator had a claim against a receiver of an insolvent trust company of an unpaid deposit account, and the receiver had a claim against the intestate, the administratrix was not limited to an action against the receiver to recover her deposit claim nor to the assertion of such right in the insolvency proceedings, but was entitled to plead her demand as a set-off to the claim of the receiver, and the superior court had jurisdiction to determine the validity of the

<sup>7</sup> *Wielff v. Roseville Trust Co.*, 164 App. Div. 399, 149 N. Y. S. 683 (1914).

<sup>8</sup> *Lippitt v. Thames Loan etc. Co.*, 88 Conn. 185, 90 Atl. 369 (1914); *Commonwealth v. American Trust Co.*, 241 Pa. St. 153, 88 Atl. 430 (1912).

<sup>9</sup> *Lebaudy v. Carnegie Trust Co.*, 154 N. Y. S. 900 (1915).

<sup>10</sup> *Lebaudy v. Carnegie Trust Co.*, 154 N. Y. S. 900 (1915); *Madison Trust Co. v. Carnegie Trust Co.*, 167 App. Div. 4 (1915), 152 N. Y. S. 517, affirmed in 215 N. Y. 475, 109 N. E. 580; *Commonwealth v. Tradesmen's Trust Co.*, 250 Pa. St. 383, 95 Atl. 578 (1915). See *Miller's Appeal*, 218 Pa. St. 50, 66 Atl. 995 (1907). See *Madison Trust Co. v. Carnegie Trust Co.*, *supra*, where a voluntary trust did not give rise to a preference under the New York Statute.

<sup>11</sup> *Henkel v. Carnegie Trust Co.*, 213 N. Y. 185, 107 N. E. 346 (1914), reversing 154 App. Div. 596, 139 N. Y. S. 969.

<sup>12</sup> *Lippitt v. Thames Loan etc. Co.*, 88 Conn. 185, 90 Atl. 369 (1914).

claim and enforce the set-off.<sup>13</sup> In New Jersey, the right of set-off rests on statute, and the general statute, which relates solely to cases of mutual debts, does not authorize one sued in the name of a trust company by the commissioner of banking and insurance to set off a debt of the trust company to him.<sup>14</sup>

(i) **Superintendent of Banks.** (1) Right to Demand Security. — Where the superintendent of banks, on taking possession of a trust company, found in its possession, certain securities which it held for petitioner, he had no right to exact, as a condition of delivery of same, that petitioner execute a release of liability for wrongful detention on the part of the trust company, the superintendent, and his deputy.<sup>15</sup>

2. Right of Action. — When the state superintendent of banks takes possession of the assets and property of a trust company, as authorized by law, for the purpose of liquidation, he may sue and be sued in effect as a receiver.<sup>15</sup> But if a statute authorizes him to sue in the name of the delinquent corporation he has no authority to sue in his own name.<sup>16</sup>

3. Succession of Trusts. — Where the commissioner of banking takes possession of an insolvent corporation to collect the moneys due it and to proceed to liquidate its affairs, he does not succeed to the execution of trusts as the successor in trust of the insolvent trust company, since he does not take charge for the purpose of carrying on the business but for the purpose of liquidating it, and if the *cestuis que trustent* does not apply for the appointment of new trustees to execute the trust, the commissioner should do so.<sup>17</sup>

4. Duty to Provide Place of Business. — It is the duty of the commissioner of banking to provide a place in which to transact his business, where the insolvent whose affairs he is administering does not own one.<sup>18</sup>

(j) **Interest.** — If the assets of an insolvent trust company are sufficient to pay all the creditors in full they are entitled to interest on balances due, as against the corporation and its stockholders.<sup>19</sup>

<sup>13</sup> *In re Bell's Estate*, 168 Cal. 253, 141 Pac. 1179 (1914); *People v. California Safe etc. Co.*, 168 Cal. 241, 141 Pac. 1181 (1914).

<sup>14</sup> *Roseville Trust Co. v. Barney*, 96 Atl. 67 (N. J.) (1915).

<sup>15</sup> *In re Carnegie Trust Co.*, 162 App. Div. 76 (1914), 147 N. Y. S. 180.

<sup>16</sup> *Van Tuyl v. New York Real Estate Security Co.*, 153 App. Div. 409, 138 N. Y. S. 541, affirmed in 207 N. Y. 691, 101 N. E. 1096.

<sup>17</sup> *Sullivan v. Knolt*, 156 Wis. 72, 145 N. W. 210 (1914).

<sup>18</sup> *Citizens' etc. Trust Co. v. Rogers*, 162 Wis. 216, 155 N. W. 155 (1915).

<sup>19</sup> *People v. Merchants' Trust Co.*, 116 App. Div. 41 (1906), 101 N. Y. S. 255, affirmed in 187 N. Y. 293, 79 N. E. 1004.

And a creditor of a trust company in liquidation whose dividends were deferred by reason of an unsuccessful contest of the claims was entitled to interest on the dividend even though he had been allowed interest in the computation of the amount of his claim.<sup>20</sup>

(k) **Compensation of Temporary Receiver.** — It is not necessary to institute a separate proceeding for an allowance of compensation and expense of temporary receivers of a trust company in insolvency proceedings. The proper practice is to settle such claims in the proceedings by the receivers for the settlement of their accounts, and to direct payment thereof out of the assets before they are turned over to the persons entitled thereto.<sup>21</sup>

<sup>20</sup> *In re Carnegie Trust Co.*, 161 App. Div. 280 (1914), 146 N. Y. S. 809.

<sup>21</sup> *People v. Knickerbocker Trust Co.*, 127 App. Div. 215 (1908), 111 N. Y. S. 2.

## CHAPTER XL

### BANK BILLS

A. ISSUE. See E, below.

§ 634. (1) Power to issue not inherent.

(2) Constitutionality of

§ 664. Issue by banks which are State Institutions.

§ 664. "Bills of credit" cannot be issued by "States"; that  
§ 665 a. is, "paper issued by the sovereign power, containing  
a pledge of its faith, and designed to circulate as  
money."

§ 664. But the bills issued by "State" banks are issued pri-  
§ 665. marily on the faith of the capital of the banks them-  
selves, and are not within the prohibition, even  
though the State guarantee their ultimate payment.

B. DEFINITION. — A BANK BILL.

§§ 635, 636. Is a promissory note of the bank, payable on demand (if  
payable at a future day, though meant to circulate after  
that day, it is a *post note*, governed, however, by the  
same rules as bank bills, except that it is entitled to grace),  
designed to circulate as money for an indefinite period?

C. BILL-HOLDER'S RIGHTS.

(1) Bank bills as legal tender.

§ 637. (a) They are *not* a legal tender, nor can they be made so by  
State statutes, except as against the issuing bank or  
in payment of State taxes.

(b) But they are a *good tender*, unless objected to on the ground  
of not being money, and the right of set-off makes them  
practically equal to a legal tender against the bank,  
even at common law.

(c) Insolvency of the bank raises serious questions. The just  
view seems to be that the bills are no longer unquali-  
fiedly a legal tender against the bank (even under a  
statute declaring them in general terms a legal tender  
to the bank), for the question is no longer one between  
the bank and the holder, but between one holder and  
another; and to allow bills obtained after notice of  
insolvency to be a legal tender or a set-off would prac-  
tically result in preferring some holders to others, and  
in allowing those who owe the bank to escape with less  
than a full payment of just debts in any case where the  
assets of the bank are insufficient to pay the bills in  
full. See § 641 b, and D, below.



## BANK BILLS

§ 637 c. North Carolina, however, dissents. And see Maryland, § 641.

### (2) Set-off.

§ 639. Subject to the general principles of set-off. <sup>323</sup> bank bills, obtained at any time prior to the suit by a *solvent* <sup>640</sup> bank, may be set off; but if the bank is *insolvent*, <sup>641</sup> they must have been obtained prior to the knowledge of the insolvency, unless perhaps under an explicit statute. See C. 3, *infra*.

So long as the bills continue to circulate as money, the holder is not affected by notice; but if he has actual knowledge, or if the bills cease to circulate as money, and become the subject of a special bargain in each transfer as to the value for which they shall be received, they cannot be used in set-off at par.

### (3) Statute of Limitations.

§ 643. Does not run against a bank bill; it is continually being reissued by the bank, or may be, and to apply the statute would defeat the very intent of bank bills, viz., indefinite circulation as good notes.

But if the bills cease to circulate, as when the bank suspends, the statute begins to run, unless State law otherwise provides, as in Tennessee.

### (4) Presentment and demand.

§ 644. Generally no demand necessary before suit.

§ 645. In case of insolvency of the bank, it is best to make demand, for if interest is allowed, it will be reckoned from demand.

### (5) Redemption.

§ 646. Upon presentment, it is the bank's duty to redeem with reasonable despatch, and artifices for delay are condemned by the courts.

The intent of the bank and the spirit of the law control; and if a *bona fide* intent to redeem with due rapidity is apparent, then, in case of delay, the bank can only be held for negligence in having insufficient facilities for business; but if the intent be evident to cause delay for the bank's advantage, it will be deemed equivalent to failure to redeem.

Banks may refuse to pay after banking hours, but must use the right reasonably, and cannot refuse to complete paying a parcel of bills, unless it would so far overstep the hour as to be a substantial inconvenience.

### (6) Lost or destroyed bills. See Lost Checks, § 395 A.

(a) A bank should not be obliged to pay a bill more than once, and, therefore, as any *bona fide* holder can demand payment, the bill must be surrendered to the bank, or the bank must be put in a position as secure as if the bill were surrendered, before it can be justly required to pay the amount of it.

(b) The true owner, however, is justly entitled to the money represented by the bill lost or destroyed, provided the bank can be made safe.

Under these principles,

- § 648. (a) If the bearer can show that certain specific bills have been destroyed, and can give a bond of indemnity, he can recover of the bank; but, generally, if he cannot prove what *particular* bills were destroyed, he cannot recover, for he provides no means by which the bank can protect itself against imposture.

This, however, seems merely a matter of evidence. Aside from questions of certainty, the last owner has a right to the money, and the bank has no right to retain what belongs to another; and perhaps cases might arise in which the destruction of a certain amount of bank bills could be so clearly proved that the bank should be held, though the numbers could not be shown.

- § 650. (b) The holder of a portion, upon proving that he is entitled to the whole bill, may recover of the bank; for the missing portion is not negotiable, and the bank will never have to pay again, unless through some mistake in verdicts.

- § 651. A published notice by the bank, that it will not pay on several notes is of no effect; one party to a contract cannot change it. Against any possible trouble or expense that may arise from having to fight the missing part should it reappear, a bond of indemnity should be given.

- § 650 a. It makes no difference how much the bill may be mutilated; the members may be erased or changed; if the bill can be identified as a genuine bill issued by the bank, recovery can be had.

Some authorities hold that no bond is necessary.

Lord Ellenborough held that a portion of a bill is negotiable, and the case would then be like that of loss of the whole bill.

- § 649. (c) When the whole bill is lost, there are two possibilities, either of which may take the shape of reality, and it is impossible to predict the outcome. (1) The bill may be entirely and forever lost, or (2) it may be lost to the former owner, and yet come to the hands of a *bona fide* holder, who will have a right to demand payment from the bank. The plaintiff on a lost bill cannot, therefore, by the nature of the case, prove that he is absolutely entitled to the money, but he can show that as between him and the bank he is entitled to the benefits of the money until it is claimed by a *bona fide* holder, if the bank can be made secure against loss by a second claimant. The probability of loss is so much greater in this case than in case of a claim upon evidence of the destruction of a bill, that some courts have thought a bond of indemnity an insufficient security in these cases. Other courts do not draw the line in that way, and such bond is not in any case an absolute security, for the obligor and sureties may all be insolvent when the time comes to call upon them. However this may be, the rights of the parties,
- § 649 A.

## BANK BILLS

security to the bank, and the use of or interest on the money represented by the bills to the owner, can be attained either by agreement of the bank to pay interest, or by the bank's paying the amount to the owner on receiving goods, stocks, or government bonds in sufficient quantity to cover the risk, such collateral to be held by the bank to answer the possible claims of a *bona fide* holder, while the interest on said security is to go to the owner.

### (7) Stolen bill. Rights of holder.

- § 658. If complete when stolen, the bank is liable to a *bona fide* holder, but not if the bill is incomplete, so that forgery intervenes to supply the defect; the bank is not liable, even though negligent in leaving the bills exposed. The forgery, not the negligence, is the proximate cause of loss.

### § 652. (8) Title and suits.

- § 653. (a) Title passes by delivery, and therefore possession is *prima facie* evidence of title; and in this country the burden is on the bank to show that the holder is not a *bona fide* holder for value, in the usual course of business, though in England, if fraud or theft is shown, the burden is put on the holder.

(b) The bank can always pay the bearer with safety, unless it has reason to believe that his title is bad.

(c) Bank bills may be *protested*, and a subsequent taker is affected with equities, whether he knew of the dishonor or not.

- § 654. (d) A finder's right is good against any one but the owner, and he may recover the bills from one with whom he deposited them, though he found them on the premises of the depositary.

### § 656. (9) Liability of stockholders to bill-holders.

### § 657. (10) Liability of officers to bill-holders.

### (11) Preference of bill-holders.

- § 655. At common law they are not preferred to other creditors, but the importance of putting the money of the country on as solid a basis as possible has induced legislative preference, and also statutes imposing a liability on stockholders for the benefit of bill-holders.
- § 656.

## D. TRANSFER OF BILLS.

### (1) Forged bills. See Forged Checks, Chapter XXXIII.

- § 659. Payment or deposit of forged bills is a nullity, but the receiver must give prompt notice on discovery.

§ 659 a. If the bills purport to be those of the receiving bank, it is held to great diligence in examining them, and after a brief time (perhaps one day) cannot correct the mistake.

§ 660. (*Quære*, whether the bank could not demand correction at any time, upon showing that the depositor is in no worse position than if the bank had refused the bills.)

- § 661. Change of numbers vitiates. See, *contra*, § 650 a.

### (2) Warranty of solvency. See § 289 d.

- § 662. By agreement or representation, the solvency of the issuing bank may be warranted by the transferrer;

but there is no implied warranty any more than of the value of goods sold or that a horse sold has not in his system the germs of disease. The only way to secure any certainty in transactions relating to bills circulating through thousands of hands is to draw a line at each completed transfer, and not allow hundreds of suits to arise, and faith in money transactions to be undermined by opening up a long series of transfers for any reasons short of the vital ones of bad faith or forgery.

§ 662 *d.* However, in case deposited bank bills are not those of the depositary, and they are treated just as a deposit of ordinary negotiable paper, and sent to the issuing bank at once, there seems no just reason to deny the receiving bank the right to cancel the credit on dishonor of the bills; it is not a case of absolute payment.

§ 662 *a.* And some cases hold that, if the bank is insolvent at the time of any payment in bills, the transferrer must bear the loss, though both parties are ignorant of the insolvency.

§ 6C2. If the transferrer knows of the insolvency, of course the loss is his.

#### E. BANK BILLS.

§ 666. May be paid out by other banks than those issuing them, unless there is a statute restriction; and even such statute has been held not to apply to bills of other banks received on general deposit, becoming thereby the property of the receiving bank.

§ 638. F. BAILMENT OF BILLS

§ 663. As collateral security.

§ 642. G. NOTE PAYABLE IN BANK BILLS.

§ 634. **Form and Characteristics.** — The function of banks, which is of the greatest public importance, is that of issuing notes or bills designed to circulate in the community as current money. The power thus to issue is not inherent or essential in the banking business, and is not necessarily implied from the conference of a general power to do banking business. On the contrary, it must be distinctly and in terms conferred in the incorporating act, or it will not be enjoyed.<sup>1</sup>

§ 635. **Definition of Bank Note.** — The instruments thus issued for circulation are technically and more accurately designated as bank notes, and are ordinarily so called in England. The name bank bills has, however, come to have the like significance, and in the United States is more frequently used in ordinary parlance. The law, even for the purpose of interpretation in criminal causes,

<sup>1</sup> § 634. See the National Banking Act, §§ 8, 21 *et seq.*, and Rev. Laws of Mass. c. 115, § 60.

recognizes the terms as equivalent and interchangeable.<sup>1</sup> A bank note or bill, so far as its language goes, is simply the promissory note of the corporation. It expresses nothing but the corporate engagement to pay a certain sum. That the payment is to be made on demand, and without interest, may or may not be stated. The presence of the statement is not indispensable, for it would always be deemed to be implied. But a bank bill, though in form a promissory note, is yet so different from it in the purpose for which it is put forth, and the legal doctrines applicable to promissory notes are so far qualified in their application to bank bills in consideration of this difference of purpose, that it seems better to regard them as distinct, though cognate, instruments. The one must be, and the other may be, negotiable by mere delivery. But the touchstone by which we can determine to which class any individual paper belongs is furnished by the question whether or not it was issued for the purpose of passing current as money for an indefinite period, in daily transactions among the people. If it was so intended, it is a bank bill. Bank bills are in the United States ordinarily printed on a peculiar paper, called "bank-note paper," colored or tinted in part or wholly, ornamented with vignettes, and having the figure and word designating the value printed in numerous places and in fanciful patterns upon each. But none of these features are essential to the character of the instrument as a bank note. None of them, except the peculiar species of paper and a water-mark skilfully inserted into the texture, appear in the notes of the Bank of England. Such peculiarities have come by custom to be regarded as sufficient evidence that the document which bears them is a bank bill. But intrinsically they have no such force in impressing this legal character. The presence of them all would not make a document a bank bill, if it was not such in fact and was issued to circulate as such. Neither would the absence of them all prevent the document from being a bank bill, if its language and the object of its emission ought to render it such. A bank would have a perfect right to have all its bills written by hand on ordinary letter-paper, and to print all its promissory notes on decorated bank-note paper, if it should choose, and the legal character of neither document would be affected by the fact.

§ 636. **Must be payable on Demand.** — *Post-note.* — A bank note or bill must be payable over the counter immediately upon

<sup>1</sup> § 635. *Eastman v. Commonwealth*, 4 Gray (Mass.) 416.

demand made in business hours at any time after its issue. If it be made payable at any future time certain, or at any stated number of days after sight, though designed to circulate after that time, it is not a bank bill, but a post-note. A post-note is of course closely like a bank note, and at least after the time of payment has arrived would probably be governed by the same rules, rather than by the rules applicable to promissory notes. Still it is, properly speaking, a distinct instrument.<sup>1</sup> It may be issued by any bank which is empowered in general terms to issue paper for circulation, if no limitation or description of the species of paper which may be issued is added.<sup>2</sup> Post-notes of a bank are not subject to the rules of demand and notice, for they are intended to circulate as money,<sup>3</sup> but they are entitled to grace.<sup>4</sup>

§ 637. **Bank Bills as Legal Tender.** — Bank bills are not money, in the strict sense of the term; that is to say, they are not legal tender, even to pay debts due the bank itself,<sup>1</sup> though they would pass as cash under a bequest.<sup>2</sup> A sheriff takes bank bills in payment of an execution at his own risk.<sup>3</sup> And they are not a good tender in court for satisfaction of a judgment.<sup>4</sup> They pass current as if they were money only by virtue of a general understanding or tacit agreement to that effect.<sup>5</sup> No State even has power to render them such by any method of legislative enactments. A law undertaking to do so would be simply void, as directly contravening Article I. sec. 10 of the Constitution of the United States, which declares that no State shall make anything but gold or silver

<sup>1</sup> § 636. *Fulton Bank v. Phoenix Bank*, 1 Hall (N. Y.) 577.

<sup>2</sup> *Campbell v. Mississippi Union Bank*, 6 How. (Miss.) 625.

<sup>3</sup> *Key v. Knott*, 9 Gill & J. (Md.) 342.

<sup>4</sup> *Sturdy v. Henderson*, 4 B. & Ald. 592; *Perkins v. Franklin Bank*, 21 Pick. (Mass.) 483; *Staples v. Franklin Bank*, 1 Met. (Mass.) 43.

<sup>5</sup> § 637. *Coxe v. State Bank*, 3 Halst. (N. J.) 172.

<sup>2</sup> *Chapman v. Hart*, 1 Ves. Sen. 271.

<sup>3</sup> *Armstrong v. Scotten*, 29 Ind. 495. *Contra*, *Scott v. Commonwealth*, 5 J. J. Marsh. (Ky.) 643; *Governor v. Carter*, 3 Hawks (N. C.) 328.

<sup>4</sup> *Hallowell, etc. Bank v. Howard*, 13 Mass. 235; *Coxe v. State Bank*, 3 Halst. (N. J.) 172.

<sup>5</sup> *Bank of the United States v. Bank of Georgia*, 10 Wheat. 333, 6 L. ed. 334; *Miller v. Race*, 1 Burr. 457; *Corbit v. Bank of Smyrna*, 2 Har. (Del.) 235; *Handy v. Dibbin*, 12 Johns. (N. Y.) 220; *Wright v. Reed*, 3 T. R. 554; *Morris v. Edwards*, 1 Ham. (Ohio) 189; *Edwards v. Morris, id.*, 524; *Bradley v. Hunt*, 5 Gill & Johns. (Md.) 54; *Morrill v. Brown*, 15 Pick. (Mass.) 177. It has also been held that a declaration averring a loss of money in bank notes is not open to objection on the ground that bank notes are not money. *Towson v. Havre de Grace Bank*, 6 Har. & Johns. (Md.) 47.

coin a legal tender in payment of debts. They are, however, a good tender unless they are specially objected to at the time on the ground that they are not legal money :<sup>6</sup> *provided*, and it is an essential proviso, that they are current bills passing at their par value in business transactions at the place where they are offered, and that they are redeemed in legal tender for their full face value upon presentation at the counter of the bank issuing them.<sup>7</sup>

(a) Payment in the bills of a suspended bank is not payment, though at the time the fact of the suspension is not known to either party.<sup>8</sup>

(b) And though they cannot be made money or legal tender among the community generally, they may be made so as towards the bank itself which issued them. Indeed, this has not unfrequently been done by several among the States.<sup>9</sup> It must be done by statute, for in the absence of legislation there is no rule of the common law which enables a debtor to a bank to discharge himself by an offer of the amount in the bills of the bank.<sup>10</sup> His only course is to avail himself of his right of set-off in respect of the notes.<sup>11</sup>

<sup>6</sup> *Bank of the United States v. Bank of Georgia*, 10 Wheat. 333, 6 L. ed. 334. A like rule prevails also in England. *Grigby v. Oakes*, 2 Bos. & P. 526; *Wright v. Reed*, 3 T. R. 544; *Anon.*, 1 Eq. Ca. Abr. 318; *Polglass v. Oliver*, 2 C. & J. 15; *Gillard v. Wise*, 5 Barn. & Cr. 134; *Pickard v. Bankes*, 12 East 20; *Thomas v. Todd*, 6 Hill 340; *Codman v. Lubbock*, 5 Dowl. & R. 289; *Owenson v. Morse*, 7 T. R. 64.

<sup>7</sup> *Ward v. Smith*, 7 Wall. 447, 19 L. ed. 207.

<sup>8</sup> *Ontario Bank v. Lightbody*, 13 Wend. 101.

<sup>9</sup> *Dunlap v. Smith*, 12 Ill. 399; *Exchange Bank v. Knox*, 19 Grat. (Va.) 746; *Union Bank v. Ellicott*, 6 Gill & J. (Md.) 363. But in Illinois an exception is made where the indebtedness to the bank arose upon the debtor's subscription for shares of the capital stock. This he must discharge in good money. *Niagara Bank v. Roosevelt*, 9 Cow. (N. Y.) 409; 26 Miss. 455; *Moise v. Chapman*, 24 Ga. 249; *Commercial Bank of Railey v. Bacon*, *Columbus v. Thompson*, 7 Sm. & Mar. (Miss.) 443; *American Bank v. Wall*, 56 Me. 167. To the same effect is also a case in Pennsylvania, which, however, makes it a necessary proviso that the bills, if offered to an insolvent bank, should have been obtained before the insolvency. *Thorp v. Wegefarth*, 56 Pa. St. 82.

<sup>10</sup> *Suffolk Bank v. Lincoln Bank*, 3 Mason, 1; *Hallowell & Augusta Bank v. Howard*, 13 Mass. 235. In the absence of any statutory provision on the subject in Massachusetts, the rule of the common law necessarily governed in this case. But see *American Bank v. Wall*, 56 Me. 167.

<sup>11</sup> *Forster v. Wilson*, 12 M. & W. 201, per Parke, B.

*Insolvency. Legal Tender. Statutes. Set-off*

(c) Even the statutes do not apply to bills obtained after notice of an assignment for creditors.<sup>12</sup> In North Carolina, however, it is held that a bank is bound by the very act of issuing a currency to receive it in payment, and that, as this obligation is a part of the contract, even the Legislature could not alter it. It is not a question of set-off, but a question of the right of a bill-holder to use the bills as a legal tender, and it makes no difference though they are acquired by the one who tenders them after execution issues against him. The assets of the bank had been put in the hands of a commissioner for the benefit of creditors.<sup>13</sup>

(d) This case does not seem to us to go to the bottom of the matter. So long as the bank is solvent, the tender of its notes to it is a question purely between the bank and the one who makes tender, and it should not be allowed to refuse them. The right to compel the bank to take them exists substantially in the right of set-off. But *where the bank becomes insolvent* the question is no longer really between the bank and the debtor holding the notes, but the holder's rights are affected by the rights of other creditor-debtors of the bank. At common law the bill-holder has no right to preference over any other creditor, but, as is very proper, such preference is given by statute; nevertheless one bill-holder is not to be preferred to another. If the assets are not sufficient to pay all the bill-holders in full, equity calls for an equal *pro rata* distribution, and this would be defeated by holding that an insolvent bank must take its bills at par. If the holder acquire the bills after insolvency, and therefore perhaps for less than their face, justice between him and other creditors requires that he should not profit from their misfortunes by obtaining more than he gave.

Suppose the bank owes A. and B. each \$1000 on bills they hold, and C. owes the bank \$1000, the bank not being indebted to him. This is the condition of things at the time of insolvency. Now, it is perfectly just that C. should pay in the \$1000 he owes; he got value for it, and his liability is in no way affected by the insolvency. Also A. and B. have equal claims, and therefore the \$1000 paid in by C. should be equally divided, each getting \$500

<sup>12</sup> Exchange Bank v. Knox, 19 Grat. (Va.) 746; Saunders v. White, 20 Grat. (Va.) 327.

<sup>13</sup> Blount v. Windley, 68 N. C. 2; Exchange Bank v. Tiddy, 67 N. C. 169; Bank of Charlotte v. Hart, 67 N. C. 264.



on the bank notes he holds. But suppose that bills obtained after insolvency could be set off or used as legal tender, B. could transfer his \$1000 worth of bills to C., for \$700, say, C. could pay over these in settlement of his debt, and A. would get absolutely nothing, while C. actually makes a speculation, paying his debt with \$300 less than the value he had received at the creation of his obligation. If C. had taken the bills before the bank became insolvent, and, therefore, presumably at least, for full value, he should be allowed to set them off; for in that case he does not really owe the bank anything at the time of insolvency, and there is no bad faith or fixing up of schemes to get more than a fair share of insufficient assets, or to pay off a debt with less than its value.

### *Taxes*

Where the charter of a bank established under State legislation provides that the bills of the bank shall be taken in payment of taxes, this does not create such a contract between the State and the corporation as to preclude the State from afterwards passing a law forbidding such bills to be longer received in payment of taxes.<sup>14</sup>

§ 638. **Bailment of Bank Bills as Collateral Security.** — Where a parcel of the bank bills of a bank are deposited with the bank as collateral security for a loan, it has been held that the deposit constitutes a bailment, and does not create a debt. It is the duty of the bank to keep and to return *in specie* the identical bills contained in the parcel and deposited with it. In the event of its not returning the collateral upon proper demand by the bailor, it will be liable to him in an action of trover.<sup>1</sup>

§ 639. **Set-off.** — If a bank sues a debtor, the debtor may set off, subject to certain restrictions, the amount of bills of the bank held by him. Though in Massachusetts, in the case cited in § 640, *Hallowell and Augusta Bank v. Howard*, it was held that the defendant could not be in a position to avail himself of the set-off until he had recovered a judgment on his bills. The right of set-off is for the nominal or face value of the bills, for it is this amount which the bank in fact owes the holder of them. The credit of the bank may be so poor that its bills are depreciated,

<sup>14</sup> *Graniteville Manuf. Co. v. Roper*, 15 Rich. Law (S. C.), 138.

<sup>1</sup> § 638. *Abrahams v. Southwestern R. R. Bank*, 1 Ritch. (S. C.) N. S. 441 (Willard, J., dissenting).

but this is not a matter of which the bank itself can be permitted to take advantage as against the holder. Bank bills may still be legally circulated although they pass for less than their par value, and their legal character remains unaltered as the promise of the bank to pay a certain sum, upon the faith of which promise, at one time or another in the past, the bank has actually received that sum, and to the holder of which promise the bank still remains liable to refund that sum. If its affairs have since been so badly managed that the holder has been able, or has been obliged to receive the bill as a representative of a less amount or value, this is not a matter which the bank can set up to diminish its indebtedness, which has long since accrued in consideration of full value received.<sup>1</sup> But though the measure of value is thus rigidly in favor of the holder of the bills, yet the right of set-off will accrue at all only under certain circumstances, as follows.

§ 640. **When the Bank is Solvent**, a holder must have come into possession of the bills at some time prior to the institution of the suit by the bank. The date of the bills is a wholly irrelevant matter.<sup>1</sup> The defendant's right of action is an original one, accruing to him directly and primarily at the moment when he becomes the bearer of the bills. He does not take the contract as assignee of the former holder who pays over the bills to him. No holder has anything to do with the possession or rights of any predecessor in possession. No connection or relationship of a legal character arises between them by reason of the naked act of transmission. The promise of the bank is to pay to the bearer. Whoever is, for the time being, the bearer, is the direct contractor

<sup>1</sup> § 639. *Robison v. Beall*, 26 Ga. 17; *Taylor v. Cook*, 14 Iowa 501. Two cases in Georgia, *Griffin v. Central Bank*, 3 Kelly (Ga.), 371, and *Collins v. Central Bank*, 1 *id.* 435, in allotting the assets of an insolvent bank, declared that the claims of the bill-holders should be estimated only at the amount actually paid by them respectively for the bills, on the ground that it would be grossly inequitable for the bill-holders, who had paid only ten cents on the dollar for their bills, to be allowed to exhaust the entire fund which was coming to the creditors, to the exclusion of persons who had given cent per cent in labor or property. Bill-holders of course could only "exhaust the fund to the exclusion of others" when they were entitled to priority of payment. In such cases the effect seems certainly grossly inequitable, as the court thought it. But it is obviously a matter to be dealt with by the legislature. The judge cited no authority in his opinion, and the law is certainly as laid down in the text.

<sup>1</sup> § 640. *Jefferson County Bank v. Chapman*, 19 Johns. (N. Y.) 322; *Carpenter v. Butterfield*, 3 Johns. Cas. (N. Y.) 145; *Dickson v. Evans*, 6 T. R. 57.

with the bank, and may maintain his suit against it upon the original promise running to himself. He is no more affected with the legal rights or liabilities of an assignee than he would have been had the issue of the bill by the bank been made directly to him in the first place.<sup>2</sup> He does not therefore succeed to a pre-existing right of action against the bank which he can use as a set-off in a pre-existing suit of the bank against himself. But he comes into possession of an original right of action which he cannot set off in a suit already pending at the time when he acquires it. Also it has been questioned whether, if the claim is only nominally that of the bank, and is in fact prosecuted for the benefit of an independent third party, the set-off of bank bills would be allowed.<sup>3</sup> It is clear that on principle there should be no set-off in such case, for the claims do not run between the same funds.

§ 641. **When the Bank is Insolvent** (§ 637), the bill-holder can set off the amount of bills held by him for their full nominal or face value, provided he had come into possession of them prior to the insolvency.<sup>1</sup> It has been said that, if any legislation exists providing for equality in the payment of bill-holders, this right of set-off is in derogation of it. But nevertheless the right is not taken away or diminished by reason of this clashing or inconsistency, which only furnishes an additional reason for the stringent enforcement of the rule requiring the possession to have been acquired prior to the insolvency.<sup>2</sup>

*Bills Received at Par, though Obtained after Insolvency .*

(a) Although the general rule is that the assignees of a bank are not obliged to take the notes of the bank, obtained after notice of the assignment, in set-off, yet such obligation may arise as a condition of the assignment, backed by statute.<sup>3</sup> In Maryland in a case where, previous to executing the deed of trust, the board

<sup>2</sup> Bullard *v.* Bell, 1 Mason 243.

<sup>3</sup> Hallowell & Augusta Bank *v.* Howard, 13 Mass. 235.

<sup>1</sup> § 641. Miller *v.* Receiver of the Franklin Bank, 1 Paige (N. Y.) 444; Bruyn *v.* Receiver, 9 Cow. (N. Y.) 413, n.; Haxtun *v.* Bishop, 3 Wend. (N. Y.) 13; Diven *v.* Phelps, 34 Barb. (N. Y.) 224; American Bank *v.* Wall, 56 Me. 167; Beers *v.* Maynard, 1 Bail. Eq. (S. C.) 168. *Contra*, Eastern Bank *v.* Capron, 22 Conn. 639; Savings Bank *v.* Bates, 8 Conn. 505.

<sup>2</sup> Clarke *v.* Hawkins, 5 R. I. 219.

<sup>3</sup> Exchange Bank *v.* Farmers' Bank, 19 Grat. (Va.) 739, p. 754; Diven *v.* Phelps, 34 Barb. (N. Y.) 224; Pancoast *v.* Ruffin, 1 Ohio 381; Housum *v.* Rogers, 40 Pa. St. 190.

of directors voted that the debtors of the bank "should have the privilege of paying their debts in notes of this bank", and there was a statute providing for the payment of debts to the bank by its bills, whether solvent or not, whether obtained before or after assignment, it was held that the assignee must receive the notes of the bank without reference to the time at which they were acquired.<sup>4</sup>

*Holder's Knowledge of Bank's Insolvency*

(b) Some questions may arise as to when the taker or purchaser of the bills is to be affected with knowledge of the bank's insolvency. No precise and definite rule has been laid down concerning this matter. The relationship existing between the individual and the bank might not unreasonably have some bearing and effect in the determination of the point in any particular case. Thus, a director obtaining bills of the bank at a discount, at a time when he himself is indebted to the bank, and also when by reason of his office he knows or ought to know that the bank is thoroughly insolvent, might well be refused the privilege of using these bills in set-off against such indebtedness; though an outsider, having no such knowledge, and obtaining bills at the same time also at a discount, but in due course of business, might be allowed to do so.<sup>5</sup> The director could hardly be fairly deemed a *bona fide* holder for this purpose. In an early case, in New York, it was declared that the mere refusal of the bank to pay specie, and the consequent stoppage of its bills, were not alone sufficient proof of insolvency to deprive a subsequent *bona fide* holder of its bills of his right to set them off. The court based their decision upon the view that these facts did not alone indicate a suspension of the banking business and an absolute deficiency of assets to meet the liabilities of the corporation, but might very probably be the result of mere temporary embarrassment and want of available funds growing out of the financial condition of the country.<sup>6</sup> In a later case in the same State, where it appeared that the bank had closed its doors, and had for all practical purposes suspended business altogether, it was held that the taker of its bills after these occurrences could not use them in set-off.<sup>7</sup>

<sup>4</sup> Union Bank v. Ellicott, 6 Gill & Johns. (Md.) 363.

<sup>5</sup> Clarke v. Hawkins, 5 R. I. 219.

<sup>6</sup> Jefferson County Bank v. Chapman, 19 Johns. (N. Y.) 322.

<sup>7</sup> Diven v. Phelps, 34 Barb. (N. Y.) 224.

*Proposed Test*

There seems to be that degree of sound argument in both these cases that it is hard to say that either of them is wrongly decided. At the same time, they are open to the objection that it is difficult to draw from them any general principle which shall be of universal and satisfactory operation. Many instances must arise in which it will be very hard to say whether or not the suspension of the bank is sufficiently complete to amount to notice of insolvency in fact. Further, the person who takes the bills may not know precisely what is the extent, or what are the circumstances, of the suspension. In short, the test which, if any, can alone be drawn from these rulings, is one which is open to many practical objections. We shall therefore take the liberty to suggest what seems to us a better one. Though it has not been supported by judicial adoption, yet at least it has the negative merit of having never been passed upon by way of rejection in any cause, so far as we have discovered. It is therefore to be fairly considered as open in the future either to acceptance or rejection. It is simply this, that so long as the bills continue to be taken and paid away by the community in general, like the bills of other banks, that is to say, so long as they continue in actual circulation *as money*, so long any person taking them as money should retain the right to set them off against the bank. When they no longer circulate *as money*, having a fixed value, but can only be passed by way of barter or exchange, becoming the subject in each case of a special bargain as concerns the valuation at which they shall be received, then it is time to say that the taker can no longer set them off for their full face value. *The manner in which they are treated by people generally, and the manner in which any individual actually comes by them*, are the two elements of determination. When they lose their traits as money, then usage no longer makes it unusual or apparently unreasonable on the part of any man to refuse to accept them as such. At this stage, and not before, it would seem to be time to deprive the subsequent taker of the privilege of securing to himself a considerable advantage over other debtors through the medium of a right of set-off. Of course, if actual knowledge of the insolvency of the bank could be shown, the holder should not be allowed to benefit by subsequently buying up the bills of the bank; but the test proposed may be regarded as drawing the proper line for *presuming* knowledge on the part of a taker

of the bills. This rule, advanced by Mr. Morse, is approved in 2 Daniel on Negotiable Instruments, § 1690.

§ 642. **Note Payable in Bank Bills.** — Where the bank is the holder of a note, which is, in terms, made payable in its own bills, if it sues thereon it shall recover for the full face value of the note, without regard to the merchantable value. For even after the issue of execution, the debtor can discharge the debt by a payment or tender of the bills of the bank.<sup>1</sup> A promise to pay a certain amount “in current bank money” is an obligation to pay “current bank bills calling on their face for” that amount, “in the same way as where one promises to pay” a certain named sum “in currency, the meaning is to pay current notes calling on their face for” that amount, “as distinguished from” that amount “in United States coin, or, as it is termed, ‘in good money.’ ”<sup>2</sup>

§ 643. **Statute of Limitations.** — A bank note is not subject to the running of the Statute of Limitations, as any other simple indebtedness or promise to pay would be, although the bill is not distinguishable in form from such a promise. Its purpose of circulation necessarily involves this result. Every time that it is reissued by the bank the promise is renewed, and it must usually be impossible, in the case of any particular bill, to say how often it has passed into the bank, and again has been paid out by it, or when it was last so paid out. But even if in any individual case it could be shown that the last issue was at a time so long past that period of the statute has since elapsed, yet another objection, which goes to the root of the matter, still remains behind. For lapse of time, in the case of these instruments, affords no presumption of their having been paid. On the contrary, their existence in other hands than those of the bank is at least *prima facie* evidence of nonpayment, since they are never paid, and generally speaking payment can never be enforced upon them at law, unless they are surrendered to the promisor.<sup>1</sup> Further, as already shown, a new contract and a new cause of action are created by each transfer, so that it might be argued that the statute could begin to run only from the time when the last holder came into possession.

<sup>1</sup> § 642. Abbott v. Agricultural Bank, 11 Sm. & Mar. (Miss.) 405.

<sup>2</sup> Lackey v. Miller, Phill. N. C. L. 26.

<sup>1</sup> § 643. Hinsdale v. Larned, 16 Mass. 70; Rev. St. c. 120, § 4.

*If the Bills Cease to Circulate, the Statute Runs*

When a bank has suspended payment and its bills have ceased to circulate as money, the Statute of Limitations applies to them as to other contracts.<sup>2</sup> If bills have ceased to be taken in and re-issued by the bank, they have lost the characteristic which exempts them from the statute.<sup>3</sup> And where a bank openly and notoriously ceased trading and banking in 1865, and its bills ceased to circulate and it issued no more bills, but confined itself to realizing assets and redeeming bills, and surrendered its charter in 1877, holders of bills should have brought suit before 1870, wherefore stockholders sued in 1878 could interpose the Statute of Limitations of 1869.<sup>4</sup> But the Tennessee Code, § 2779, — excepting from the six years' limitation all notes "issued or put in circulation as money", — applies to notes issued by banking corporations under the laws of Tennessee, whether the notes have ceased to circulate as money or not, or whether the bank has or has not ceased to exist as a corporation.<sup>5</sup>

§ 644. **Presentment and Demand.** — If a bank note is made payable generally, suit may be brought upon it without prior demand. Where bills are made payable at any particular place, as at the banking-house of the corporation, the rule is still somewhat doubtful. It has been held in Georgia that demand at that place must be averred and proved.<sup>1</sup> In other decisions it has been asserted that the suit still be sustained, even though no demand has been made; but that if the bank brings the money into court and shows its ability and willingness to have paid, had presentment been made at the place named, then it shall lose neither interest nor cost.<sup>2</sup> If demand be necessary at all, it must be made at the place designated upon the face of the instrument. Even if that place be other than the corporate banking-house, the rule is unaffected by this fact, and demand at the banking-house

<sup>2</sup> *Samples v. Bank*, 1 Woods 523 (1873).

<sup>3</sup> *Kimbrow v. Bank of Fulton*, 49 Ga. 419.

<sup>4</sup> *Johnston v. Talley*, 60 Ga. 540 (1878).

<sup>5</sup> *State v. Bank of Tennessee*, 5 Baxt. (Tenn.) 101 (1875).

<sup>1</sup> § 644. *Dougherty v. Western Bank*, 13 Ga. 287.

<sup>2</sup> *State Bank v. Van Horn*, 1 South. (N. J.) 382; *Haxtun v. Bishop*, 3 Wend. (N. Y.) 13; *Bryant v. Damariscotta Bank*, 18 Me. 240; *Bank of Niagara v. McCracken*, 18 Johns. (N. Y.) 495, where the individual opinion of the judge (Woodworth) was thus stated, but no decision by the court was either needed or given. See *Jefferson County Bank v. Chapman*, 19 *id.* 324; *Bank of Kentucky v. Hickey*, 4 Litt. (Ky.) 225.

cannot be substituted for demand at the place named.<sup>3</sup> The course has often been adopted of requiring, through statutes, that banks putting bills in circulation shall deposit with some public officer bonds or stocks as security for the ultimate redemption of these bills. The same legislation also usually designates the manner in which these securities may, upon occasion, be resorted to, usually through the medium of the same State official who receives them. But provisions of this description have no effect upon the right of the bill-holder to sue the bank directly, unless some restriction is expressly imposed in terms in the law itself. The legislative security is not given instead of, but in addition to, the holder's private right of action. It is collateral to that right, and cumulative; but does not supersede it. Neither is the bill-holder's right to sue for any balance remaining due to him infringed by the fact that he has received as large a dividend upon his claim as the State officer is able to pay from the securities deposited. He is entitled to payment in full. In his suit to recover the unsatisfied balance, he will be held simply to show how much he has already had paid to him from the official source, and will not have to go into the matter of the sufficiency or correctness of the official's proceedings. Nor will he be in any way affected by the assertion or proof of their insufficiency or incorrectness.<sup>4</sup>

§ 645. **Demand advisable in Case of Insolvency.** — If the bank becomes insolvent, it is well to make a demand. For where interest upon claims on bank notes is allowed at all, the current of authority seems to be in favor of the rule of calculating it only from the time of the demand, and not from the date of the suspension, or of the commencement of proceedings in insolvency. There seems no sound reason for making a distinction in this doctrine by reason of the fact that the bills are or are not made payable at any particular place. If no place is named, the assumption must be that payment will be made at the banking-house. It is natural for the holder to demand payment there; and therefore, if demand would otherwise be necessary in order to make the interest begin to run, it ought also to be necessary, though the bill is not in terms made payable at any especial place. The date of the bill has nothing whatsoever to do with the matter; it can never, simply as such, be taken as the starting-point in the reckon-

<sup>3</sup> *King v. Dedham Bank*, 15 Mass. 447; *Ware v. Street*, 2 Head (Tenn.) 609.

<sup>4</sup> *Conwell v. Hill*, 14 Ind. 131.



ing of interest.<sup>1</sup> Indeed, the date of a bank bill is a matter of very little moment. As has been seen, it does not afford a basis for the calculation under the Statute of Limitations; and evidence may at any time be introduced to show that it was not in fact executed or issued by the bank until long after its nominal date.<sup>2</sup> Where a statute gave damages in case of failure of the bank to redeem its bills on demand, at the rate of ten per cent per annum, so long as the suspension should continue, it was held that these damages might be recovered in addition to the ordinary six per cent, which would be recoverable as of course from the time of the demand.<sup>3</sup>

§ 646. **Redemption.** — *Artifices for delay condemned. Bank must pay with reasonable despatch. Spirit of the law and intent of the bank governs.* — There is no necessity for a separate presentment and demand upon each separate bill. The presentment of a package is perfectly proper.<sup>1</sup> But for the purpose of determining in what description of coin, and in how many pieces of each respective denomination, payment may be legally tendered by the bank, it has a right to treat each bill as a distinct demand.<sup>2</sup> An artifice, which is often resorted to by banks when short of funds, is to delay payment upon the bills presented as much as possible by the exercise of every method of exhausting time which the ingenuity of the officers can invent. The employment of only a single official, the inspection by him with affected accuracy and minuteness of each individual bill presented, the slow counting out by him of the smallest coins in which payment can be legally made, are all familiar devices by which banks hard pressed not unfrequently seek relief. Such proceedings have been uniformly and resolutely condemned by the courts. The duty and undertaking of the bank is not alone to redeem its bills, but to redeem them with reasonable despatch; and intentional dilatoriness is a clear breach of the obligation. What is reasonable despatch is

<sup>1</sup> § 645. *Ringo v. Trustees of Real Estate Bank*, 8 Eng. (Ark.) 563; *Bank Commissioners v. Lafayette Bank*, 4 Edw. Ch. (N. Y.) 287. But in Ohio interest has been allowed from the date of suspension of specie payment. *Atwood v. Bank of Chillicothe*, 10 Ohio, 526. Interest runs from demand, not from date. *Bank of Kentucky v. Thornsberry*, 3 B. Mon. (Ky.) 519.

<sup>2</sup> *Selfridge v. Northampton Bank*, 8 Watts & S. (Pa. St.) 320.

<sup>3</sup> *Wendell v. Washington & Warren Bank*, 5 Cow. (N. Y.) 161; *People v. Same*, 6 *id.* 211.

<sup>1</sup> § 646. *Reapers' Bank v. Willard*, 24 Ill. 433.

<sup>2</sup> *Boatman's Savings Institution v. Bank of Missouri*, 33 Mo. 497.

a point which is of course incapable of accurate abstract definition. No precise number of officers can be declared to be necessary, and no precise number of minutes or seconds can be arbitrarily allotted as proper for the payment of a certain number of bills. The bank is entitled to an opportunity to satisfy itself of the genuineness of the bills before it pays them. But unless some peculiar circumstances give rise to unusual suspicions, it is expected to be able to do this with considerable expedition. In each particular case the court will look at all the circumstances, and will infer from them the *animus* of the bank. If the design appears to have been evasive, and an effort on the part of the bank to create delay, simply as such, and in order to secure its own selfish advantage, then, though the officers have scrupulously observed the technical requirements of the law, though they have never refused redemption, but have maintained a steady payment, they will not be absolved from the just result of their really unfair conduct. The non-infringement of the letter of the law will not cover the real infringement of its spirit. The proceedings will be regarded as tantamount to a deliberate refusal in terms on the part of the corporation to redeem its circulation on demand. Though the officers may have carefully reiterated their intention to redeem, yet the testimony of facts will outweigh that of words. But if the *bona fide* intent was apparent to redeem the bills with sufficient rapidity, and according to the usual course of banks in this department, then the bank could be held only upon the ground of a culpable deficiency in its arrangements and facilities, amounting to, and for which it would be liable as, gross negligence.<sup>3</sup>

§ 647. **The Banking Hour Limit must not be unreasonably used.**—As a general rule, banks are entitled to the benefit of the limitation of bank hours. It is absolutely necessary that they should have some of the afternoon hours free from the interruptions, and even more from the constant changes in their accounts and money matters, unavoidably produced by the transactions of business. But an effort to take advantage of bank hours which is clearly evasive of a reasonable duty will not be protected. Thus, if a parcel of bills be presented just before the close of bank hours for redemption, a refusal to redeem simply because the transaction could not be wholly completed before the hour would be unjustifiable; but if it would necessitate the trespassing to a substantial

<sup>3</sup> *Suffolk Bank v. Lincoln Bank*, 3 Mason 1; *Reapers' Bank v. Willard*, 24 Ill. 433; *People v. State Treasurer*, 4 Mich. 27.

and really inconvenient extent into the afternoon period of office labor, then the refusal would be proper. The criterion of reasonableness will be applied in all such cases, and only within its protection will the rule of banking hours be recognized and respected.<sup>1</sup>

§ 648. **Payment of Lost or Destroyed Bank Notes.** — Ordinarily payment upon a bank bill or note is conditional upon its surrender. Four classes of cases have arisen in which payment has been sought to be enforced without an offer of surrender; viz. where there has been (1) destruction of the whole bill; (2) loss of the whole bill; (3) destruction of a part of the bill; and (4) loss of a part of the bill.

1. **Destruction of the Whole Bill.**— *Last owner may recover, but to protect bank he is required to prove clearly the destruction of specific bills, and to give bond.* — The least difficulty is encountered in laying down the rule in this case. It cannot be questioned that, if the total and absolute destruction of the bills can be shown, the last holder or owner of them, he who was entitled to demand payment upon them at the time of the destruction, can recover from the bank; not of course upon the instruments themselves, which must be offered for surrender as preliminary to collection upon them, but upon the original promise of the bank of which they were the documentary evidence. This rule is perfectly established, and the difficulty arising in cases of destruction does not grow out of any doubtfulness concerning it, but out of the stringent rules which are applied to the sufficiency of the evidence offered by the plaintiff. It is obvious that the bank must always labor under extreme disadvantages in suits of this character, and the courts have made it their task to surround the bank with such substantial protection as the nature of the case permits. (1) It is probable that in the great bulk of such cases the bank would be without *any possible means of disproving either the plaintiff's possession, or the alleged destruction of the bills, even though the entire story were false.* Beyond the testimony to these points, therefore, he is further held to considerable accuracy in the secondary evidence, descriptive of the bills and notes asserted to have been destroyed. Proof of destruction of bills and notes is not enough; it must be proof of the destruction of *specific* bills and notes, and this can be accomplished only by means of a description of each one of them. Evidence adduced by the plaintiff, and

<sup>1</sup> § 647. *Suffolk Bank v. Lincoln Bank*, 3 Mason 1; *People v. State Treasurer*, 24 Ill. 433.

naturally uncontroverted by the bank, that he had lost in a fire a parcel of the circulating bills of the bank amounting in all to a certain sum, is insufficient; for it would not serve as an identification of the bills, nor enable the bank to protect itself against them should the destruction at any time afterward appear not to have been accomplished. *The same impossibility of identifying the bills would render it also impossible to give to the bank any sufficient bond of indemnity against reappearance.* For no particular bills could be described in such a bond. (2) It was well observed in the *Massachusetts* case cited below,<sup>1</sup> that “*the defendants have not contracted to redeem their bills, except upon their production and delivery; and it is the negligence or misfortune of the plaintiff that they cannot be produced. The plaintiff is then bound to furnish an equivalent; to put the defendants in as good a position as if the bills were produced.*” If he cannot do this, he has no right to shift the consequences of the loss upon a party in nowise answerable for it. . . . Upon the whole matter, the court are of opinion that to permit a plaintiff to recover . . . upon bills circulating as currency and available to any one taking them *bona fide*, without such means of distinguishing the particular bills as would admit of an adequate indemnity, would open a wide door to fraud, would be incompatible with the reasonable security and rights of the defendants, and is not required by law.” The whole opinion in this case, delivered by Judge Hoar, is very satisfactory and conclusive. It will be observed, however, that the doctrine first laid down in this paragraph is not at all impeached by this or any other of the cases cited, the result of all which is to be referred wholly to the fact that in them all the respective plaintiffs were unable to identify the destroyed bills. Had they been able to do so, by describing the mark of the issue and the numbers of the bills, so that they could have executed a sufficient bond of indemnity against their future reappearance, they could have recovered upon them, and possibly even without being held to give such a bond, which is in none of these cases asserted to be indispensable,<sup>1</sup> and in that cited from the *Alabama Reports* is distinctly stated to be needless. The theory of the law would not require it. The right to recover on the original indebtedness ought to be perfect upon satisfactory

<sup>1</sup> § 648. *Tower v. Appleton Bank*, 3 Allen (Mass.) 387; *Burridge v. Geauga Bank*, Wright (Ohio) 688; *Bank of Mobile v. Meagher*, 33 Ala. 622; *Bank of Louisville v. Summers*, 14 B. Mon. 1 (Ky.) 306; *Hagerstown Bank v. Adams Express Co.*, 45 Pa. St. 419; *Hinsdale v. Bank of Orange*, 6 Wend. (N. Y.) 378.

proof of destruction. *The requirement of a bond would seem to be matter of equity rather than law.* Yet so just and reasonable does it seem, that the courts of law are sometimes willing to enforce it. The description, whether by number and mark of issue, or other means of identification, is mere matter of proof upon the trial. It need not be set forth in the pleadings; and a declaration describing only a certain number of the notes or bills of a certain bank, and of a certain denomination, is sufficient.<sup>2</sup>

§ 649. 2. **Loss of the Whole Bill.** — In this case it cannot be doubted that the loser could have no right to demand payment of the original debt from the bank. It may be properly considered that so long as the bill in a perfect condition, that is to say not materially mutilated, continues to exist, the original debt is inseparable from it.<sup>3</sup> It is only after it has been destroyed, either wholly or to such an extent that it has lost its negotiability, that the right to sue upon the original indebtedness accrues. For bank notes notoriously pass by delivery. Any person who takes them *bona fide* for value has a claim against the bank for their amount, which is unaffected by any previous circumstances in the chain of title. This being the case, therefore, it is clear that the bank may be called upon to pay twice over if it can be held to pay both the loser and a subsequent *bona fide* holder. *There is no reason why the bank should be subjected to a gross and obvious injustice simply to relieve the loser from a hardship or misfortune. Neither is it possible to give a satisfactory bond of indemnity.* Even supposing, which could rarely happen, that the loser could so accurately describe the bills that they could be identified and distinguished from all others of the same issue, still the bank would be obliged to pay them to any *bona fide* holder who presented them, and it is not likely that they would be presented at the counter for redemption by any other party. The thief or the finder would hardly resort to this means of securing the profit of his booty. Even if it could be supposed that he would do so, still it would be imposing upon the bank an onerous duty, growing out of no negligence or misconduct on its own part, to require it to watch for and detect the wrongdoers. Adjudicated cases support this view.<sup>1</sup> But there has been very little discussion of the subject,

<sup>2</sup> Carey v. Greene, 7 Ga. 79.

<sup>3</sup> § 649. See § 649 A.

<sup>1</sup> Hinsdale v. Bank of Orange, 6 Wend. (N. Y.) 378; Martin v. Bank of United States, 4 Wash. (C. C.) 253; Solomons v. Bank of England, 13 East 135, n.; Raphael v. Bank of England, 17 C. B. 161.

rather, one would think, because it was so plain that it left no room for doubt than from any deficiency in opportunity or temptation to institute such suits. Yet, strange to say, one State has adorned its judicial annals with decisions to the contrary effect.<sup>2</sup> However amusing may be the rhetoric of the court in the earlier of the two cases cited, it is impossible to pretend that they are entitled to be deemed legal authorities. To support this criticism it is needful only to give in the judge's own language the consideration upon which he was content to base his ruling: "It would be difficult for any ingenuity to designate a happy casualty by which he (the owner) could flatter himself with the hope of his having them restored." We are constrained to doubt the conclusiveness of this gracefully phrased argument. Some stress is laid in this case upon the fact that the plaintiff and loser had published, apparently in the newspapers, notice of his loss and of his claim to the bills. The legal effect of such publication has never been judicially declared. But it cannot be conceived that any practical advantage would be likely to accrue from it. No court would of course regard it as constructive notice to any particular member of the community;<sup>3</sup> and to bring home to him actual knowledge by showing that he had read the notice, and that he knew or ought to have known from it that at the time he took the bills they were the identical ones therein described, would require such a rare combination of lucky circumstances as it is quite inconceivable should ever occur. Notice of the loss of a certain number of bills of a certain denomination issued by a certain bank would of course be utterly meaningless. No individual bills would be described thereby, and the circulation of the entire issue could not be stayed because an individual had met with a loss.

In case of the loss of a negotiable promissory note, the holder may recover, but equity will compel him to give a bond of indemnity.<sup>4</sup> And the same rule is held as to bank notes in Georgia,

<sup>2</sup> *Waters v. Bank of Georgia*, R. M. Charl. (Ga.) 193; *Robinson v. Bank of Darien*, 18 Ga. 65. This case adds the important proviso that suitable indemnity must be tendered by the plaintiff. As we have taken pains to show in the text, a really efficient indemnity may be regarded as a practical impossibility. See, however, § 649 A.

<sup>3</sup> *Bank of United States v. Sill*, 5 Conn. 106.

<sup>4</sup> *Davies v. Dood*, 1 Wils. Ex. 110; *Macartney v. Graham*, 2 Sim. 285; *Story Eq. Jur.*, §§ 85, 86; *Wade v. New Orleans Canal, etc. Co.*, 8 Rob. (La.) 140.

as noted above.<sup>5</sup> The tone of the court in Massachusetts<sup>6</sup> is not at all against recovery in case of loss, this word being used continually in connection with destruction, — “loss or destruction”; but the numbers must be provable, so that a bond can be given. “Suppose several parties should sue on bills alleged to have been destroyed, and should recover, each giving bond: If it should afterward appear that all the bills had not been destroyed, upon which bond would the defendants have a remedy?” And the language of the court in California is the same, a bond must be given in case of the “loss or destruction” of a certificate of deposit, each certificate being held negotiable.<sup>7</sup> If the paper comes to the hands of a *bona fide* holder, and the obligor and his sureties are insolvent, it is a great hardship on the bank. But the hardship does not attach alone to the case of loss, there is only a difference of degree; the bank may be subjected to expensive and protracted litigation when a bill supposed to have been destroyed turns up, or is claimed to have turned up, as well as in the case of one lost, and against all such burdens the bank should be protected, and in any case the bond may prove worthless when the time to test it comes. There is more likelihood of this in case of a mere loss. The plaintiff on the face of this case fails to prove that he is the true creditor, for the bill may have come already to the hands of a *bona fide* holder; as to him the plaintiff is not entitled, but as to the bank the money does belong to the plaintiff, and if the bank can be properly guarded from danger the plaintiff should recover.

It seems to us that this might be done by depositing bonds of the United States with the bank sufficient to cover the amount, the bank to keep them as security, but the interest to go to the plaintiff. The bank is not entitled to retain the principal as its own, and use it; it is only entitled to be secure against future demands.

§ 649 A. **Proposed Solution of the Problem of Lost Bills.** — The opinion of Messrs. Morse and Daniel in this matter of loss of the whole bill does not commend itself to us. As between the bank and the owner of the bill at the time of loss, the money belongs to the latter. If it is paid over to the owner, however, the bank will be endangered; while if it is retained by the bank,

<sup>5</sup> *Waters v. Bank of Georgia*, R. M. Charl't. (Ga.) 193; *Robinson v. Bank of Darien*, 18 Ga. 65.

<sup>6</sup> *Tower v. Appleton Bank*, 3 Allen (Mass.) 387.

<sup>7</sup> *Welton v. Adams*, 4 Cal. 37.

and the bill is really lost and never turns up, the bank has gained the use of money to which it had no right.

There is a practical method of securing the bank and at the same time giving the owner the use of his money, viz., to order the bank to pay the amount of the lost bills to the owner upon receiving a deposit of stock or Government bonds sufficient to cover the risk of a second payment, such security to be held by the bank until the Statute of Limitations has barred any possible claim upon the missing paper, but the income from the collateral to belong to the depositor. This method would secure the rights of both parties satisfactorily, even if an ordinary bond of indemnity is considered insufficient, the risk being greater than in case of a bill claimed to be destroyed.

§ 649 B. **When Indemnity is not Necessary.** — It has been held that no indemnity shall be required when a lost bill or note has been traced to the defendant,<sup>1</sup> because then it could not become the property of a *bona fide* holder without default of the defendant; or when the instrument was never negotiable;<sup>2</sup> or was restrictively indorsed before loss; or was payable to order and not indorsed;<sup>3</sup> or when the instrument is shown to have been destroyed;<sup>4</sup> or when the debt at the time of the suit would be barred by the Statute of Limitations;<sup>5</sup> for in none of these can harm come to the defendant.

This would be true if the facts are in reality what the jury consider them, and if such state of things be *admitted* by the defendant, it is just to hold him to pay without indemnity; but if there be any dispute, no matter how clear the evidence *seems*, we think indemnity should be given,<sup>6</sup> for human conclusions, even those of a jury, are strangely subject to error, and the paper may after all reappear in the hands of a *bona fide* holder for value

<sup>1</sup> § 649 B. *Murray v. Burling*, 10 Johns. (N. Y.) 172; *Smith v. M'Clure*, 5 East 476; *Buck v. Kent*, 3 Vt. 99.

<sup>2</sup> *Wright v. Wright*, 54 N. Y. 437; *Clark v. Reed*, 12 Sm. & Mar. (Miss.) 554; *Lazell v. Lazell*, 12 Vt. 443; *Crowe v. Clay*, 9 Exch. 604.

<sup>3</sup> *Hopkins v. Adams*, 20 Vt. 407; *Moore v. Fall*, 42 Me. 450; *Lazell v. Lazell*, 12 Vt. 443; *Branch Bank v. Tillman*, 12 Ala. 214; *Depew v. Wheelan*, 6 Blackf. (Ind.) 485; *Price v. Dunlap*, 5 Cal. 483.

<sup>4</sup> *Bank of United States v. Sill*, 5 Conn. 106; *Hinsdale v. Bank of Orange*, 6 Wend. (N. Y.) 378; *Patton v. State Bank*, 2 Nott & McC. (S. C.) 464; *Scott v. Meeker*, 20 Hun (N. Y.) 163.

<sup>5</sup> *Torrey v. Foss*, 40 Me. 74; *Moore v. Fall*, 42 Me. 450.

<sup>6</sup> *Price v. Dunlap*, 5 Cal. 583; *Welton v. Adams*, 4 Cal. 37; *Wade v. N. Orleans etc.*, 8 Rob. (La.) 140; 2 Parsons, Notes and Bills, 304; *Daniel*, Neg. Inst., § 1481.



without notice, who can claim payment again from the maker or indorser. For example, though it be proved beyond shadow of doubt that a bill has been destroyed, the possibility remains that it may have been *negotiated before destruction*.

§ 650. 3, 4. **Destruction of a Part of the Bill; Loss of a Part of the Bill.** — These two points may be considered together, for both rest upon the same general principle. That principle is, that a *piece or fraction only of a bank bill is non-negotiable*. Negotiability is an attribute of the bill as a whole. When it has been severed into parts, this quality pertains to no one of them. They are not even payable *pro tanto*, according to the ratio of the size of the part to the whole. Any person who takes a piece takes it subject to all the equities which burdened it in the hands of the party transferring it. It makes no difference whether or not value has been parted with by the holder in exchange for it. It must be traced back through the series of intermediate holders until it is brought into the hands of the first person who received it in its fractional condition. If he came by it dishonestly, or if he found it and so parted with no value in exchange for it, then this imperfection in his title adheres to it throughout its entire subsequent career, and no recovery can be had upon it. Hence it is obvious that the bank can never be held to pay more than once upon one bill. Only the original owner who was entitled to the whole bill could show a good title, and he only could recover. There seems therefore to be no sound reason why any person presenting a *fragment of a bill, and proving conclusively his ownership of the whole bill could the remainder of it be produced, should not be allowed to recover its full amount*. For there can be no true owner of the entire bill, and no one who cannot prove himself such can ever recover. But claims of this description would seem to furnish peculiarly proper opportunity for demanding that indemnity<sup>1</sup> be given to

<sup>1</sup> § 650. Story holds that a bond of indemnity should be given to secure the bank against loss by the appearance and setting up of the other part of the bill. Story on Bills, § 448. But Professor Parsons thinks that no bond should be required, for if the holder of the missing half sues on it, the bank can plead in bar its payment in the former action. 2 Parsons, Notes and Bills, 313. If a plea of payment on the first half were always good in bar, this rule would come near to justice. But courts are liable to make mistakes, and if the holder of the second half could show that he was really the owner, and not the one to whom the bank had paid, the former judgment would not conclude him who was not privy to it. Especially if the holder of the first half was now insolvent, and the holder of the second part could not recover from him, would he have a just claim

the bank, and it will be seen on examination of the cases cited below that it is generally expected. The obstacle of difficulty in identification no longer exists; and cases can easily be conceived in which it might appear, after the bank had made the payment, that an imposition had been successfully practiced. The proper *privilege of the bank is to require surrender of the whole bill before paying it, and if this privilege is taken away in any peculiar case, every safeguard against conceivable injury in consequence should be given in its stead.* We have stated the doctrine as it seems to us, and as it is laid down by many respectable authorities.<sup>2</sup> Especially conclusive is the reasoning of Judge Marcy in *Hinsdale v. Bank of Orange*. Lord Ellenborough had expressed the opinion that the rightful owner of the whole bill, holding a half only, could not maintain his action, because the other half might come into the hands of a *bona fide* holder who could sue; and so two recoveries might be had.<sup>3</sup> But, says Judge Marcy, this implies the negotiability of the second half. If it is non-negotiable, of course it can never come into the hands of a *bona fide* holder, and Lord Ellenborough's supposed difficulty can never arise; that it is non-negotiable "is as clear to my mind as the proposition is certain that a part is not equal to the whole." Certainly the impression in the community is so general to the same effect that it would be difficult to imagine that any person could in real honesty and good faith, receive a half of a bank bill as money. To the same effect, and very excellently put, is the decision cited from 4 Washington's Circuit Court Reports.

#### *Mutilation. Change of Number*

(a) Mutilation of bank bills will not affect a holder's right to recover if enough remains to identify them as genuine bills, against the bank. If he could prove that the former judgment was wrong, the bank would be liable to him; and at any rate the costs the bank could recover in the second suit, if decided in its favor, would not cover its expenses. This burden and risk, we think, should be borne by the one who asks the bank to pay on part of a bill, and a bond should be required.

<sup>2</sup> *Hinsdale v. Bank of Orange*, 6 Wend. (N. Y.) 378; *State Bank v. Aersten*, 3 Scam. (Ill.) 135; *Commercial Bank v. Benedict*, 18 B. Mon. (Ky.) 307; *Northern Bank v. Farmers' Bank*, *id.* 506; *Patton v. State Bank*, 2 N. & M. (S. C.) 464; *Armat v. Union Bank*, *id.* 471, n.; *Bank of United States v. Sill*, 5 Conn. 106; *Bullet v. Bank of Pennsylvania*, 2 Wash. (C. C.) 172; *Martin v. Bank of the United States*, 4 *id.* 253; *Bank of Virginia v. Ward*, 6 Munf. (Va.) 166; *Farmers' Bank v. Reynolds*, 4 Rand. (Va.) 185.

<sup>3</sup> *Mayor v. Johnson*, 3 Camp. 324.

actually issued by the bank. Even erasure or change of the numbers will have no effect, as the numbers of a negotiable or other instrument in a series is not a material part of it. The number only serves to identify, and if it can be otherwise identified it is sufficient.<sup>4</sup>

*Effect of Lord Ellenborough's Rule*

§ 651. The custom of severing bank bills in order to send them more safely by mail has been so common that cases where one half was either lost or destroyed have been of frequent occurrence; and were it not for the ruling of Lord Ellenborough there would be no break in the uniform maintenance of the doctrine above laid down. As it is, a comparison of the reasoning upon the one side and the other is clearly in its favor, and the authorities which support it are so abundant that it ought not to be any longer open to question. If it is correct, it follows that it makes no difference whether the missing half has been utterly destroyed or only lost. The effect of the two facts upon the right of the lawful owner to recover is precisely the same. But if the contrary doctrine, as asserted by Lord Ellenborough, is to be sustained, then a material distinction will be established between the two classes of cases. Upon proof of utter destruction of all parts of the bill save that presented for redemption, the holder of that part must be allowed to recover, if not upon it, yet upon the original indebtedness. Clearly the analogy of the case of destruction of the whole must govern. But if only a loss of the other parts be proved, then the holder of the part presented can recover only in the same way, and for precisely the same reasons, as if he had lost the whole bill. The theory then adopted is, that the other part or parts are as negotiable as the whole, and of course the same rule applies to both cases. The holder of a part is never entitled to a proportionate payment. The indebtedness is indivisible. Some one person is entitled to the whole, and no other person can be entitled to anything less.<sup>1</sup>

*Notice by Bank that it Will not Pay Part of a Bill*

An effort has sometimes been made by banks to save themselves altogether from the necessity of ever paying upon any

<sup>4</sup> Note-holders of *Bank of Tennessee v. Funding Board*, 16 Lea (Tenn.) 46; *Birdsall v. Russell*, 29 N. Y. 220; *Commonwealth v. Savings Bank*, 98 Mass. 12; *City of Elizabeth v. Force*, 29 N. J. Eq. 591.

<sup>1</sup> § 651. *Farmers' Bank v. Reynolds*, 4 Rand. (Va.) 186.

portion less than the whole of a bill, by publishing the statement that they will not hold themselves liable upon several bills, and by otherwise using such means as are in their power to notify the community generally of this intention. But such attempts are utterly impotent towards affecting the desired immunity. The bank is simply a party to the contract to which the rightful owner is the other party. Neither can, by a simple proclamation of its wishes or intentions, injuriously affect the rights which the law gives to the other under the contract and as an essential part of it. The sole exception must lie in the express assent of the other party, and his consequent voluntary abandonment of his rights, which would have to be affirmatively shown. So improbable an inference as against the bill-holder will never be based solely upon the simple fact of the declarations made by the bank and published by it in the newspapers.<sup>2</sup> When the plaintiff in a suit upon a bank bill recovers, he is entitled only to the amount of the bill and interest thereon, (which, as above stated, must apparently be calculated from the time of his making an actual demand for redemption), and the ordinary costs of court. Incidental damages can never be allowed.<sup>3</sup> If several banking firms undertake to issue bills for circulation, stating that any one of the firms will redeem, the firms are severally liable upon every bill so issued which does not designate in terms by which firm it will be paid.<sup>4</sup>

§ 652. **Title and Suits.** — It is familiar that the title in bank notes passes by mere delivery. It has also been seen that the receiver of bills has the position of an original promisee of the bank. He does not, as by an assignment, take only the title of the person paying them over to him. He need only receive them in the usual course of business for a full and fair consideration and in good faith. His title is then unimpeachable by any party, though they may have been put in circulation fraudulently, or may have been stolen from the bank or from a subsequent holder.<sup>1</sup> Hence it follows, as a rule of law, that possession is *prima facie* evidence of title. The holder may sue the bank and recover simply by virtue of such

<sup>2</sup> *Martin v. Bank of the United States*, 4 Wash. (C. C.) 253; *Bank of United States v. Sill*, 5 Conn. 106.

<sup>3</sup> *Bank of St. Mary's v. St. John*, 25 Ala. 566.

<sup>4</sup> *Taylor v. Cook*, 14 Iowa 501.

<sup>1</sup> § 652. *Bay v. Coddington*, 5 Johns. Ch. (N. Y.) 54, and cases there cited; *White v. How*, 3 McLean 111; *Robinson v. Bank of Darien*, 18 Ga. 65; *Maury v. Ingraham*, 28 Miss. 171. Also see, especially, *Goldsmid v. Lewis County Bank*, 12 Barb. (N. Y.) 407.

possession, unless the bank can show by positive proof that the possession was obtained *mala fide*.<sup>2</sup> The bank may *always safely pay the holder, and will discharge itself thereby, unless it knows, or has sufficient reason to know, that the possession was fraudulently come by*.<sup>3</sup> But the mere fact that the bills have passed through the hands of a *bona fide* owner since the theft or fraud does not wholly wipe out its effect. Such a holder cannot transmit a pure title to one receiving them from him with notice of the facts.<sup>4</sup>

It is held that bank notes may be protested, and that one acquiring them after dishonor takes subject to equities whether he knew of the dishonor or not.<sup>5</sup>

§ 653. **Bills payable to Bearer.** — Bank bills are now usually made payable to bearer, though sometimes they are expressed to be payable to A. B. (naming some person who may be either real or fictitious) or bearer. The rights of the holder are not in any shape affected by the use of the latter form. Bills so written are, for all purposes, precisely the same as if they had been made simply payable to bearer. In a suit upon such a bill once instituted in one of the United States courts, it was argued that the person named might not have been competent to sue the defendants in those courts. The objection was disposed of by the Supreme Court of the United States with the remark, "This court has uniformly held that a note payable to bearer is payable to anybody, and not affected by the disabilities of the nominal payee."<sup>1</sup>

§ 654. **Finding Bank Bills on Premises of Another. — Bequest.** — A person picked up some bank notes on the floor of a shop and handed them to the shopkeeper, to hold them till the owner should come and claim them. The shopkeeper had no previous knowledge that the notes were on his floor. The shopkeeper caused abundant advertisement to be made, but the loser never

<sup>2</sup> Worcester County Bank v. Dorchester etc. Bank, 10 Cush. (Mass.) 488; Wyer v. Dorchester, etc. Bank, 11 Cush. (Mass.) 51; Crawford v. Royal Bank, Ross Lead. Cas. 229; Louisiana Bank v. Bank of United States, 9 Mart. (La.) 398. But in England this difference between the case of bank notes and other negotiable paper as to the burden of proof is not allowed; and if it is shown that the bills were stolen or lost, or obtained by fraud, the holder must prove that he is a *bona fide* holder for value in the usual course of business. De la Chaumette v. Bank of England, 9 Barn. & Cr. 208.

<sup>3</sup> New Hope Delaware Bridge Co. v. Perry, 11 Ill. 467.

<sup>4</sup> Olmstead v. Winsted Bank, 32 Conn. 278.

<sup>5</sup> Burroughs v. Bank of Charlotte, 70 N. C. 284.

<sup>1</sup> § 653. Bank of the Commonwealth of Kentucky v. Wister, 2 Pet. 318, 7 L. ed. 437; Bullard v. Bell, 1 Mason (C. C.) 243.

appeared to reclaim his lost property. At the end of three years the finder tendered to the shopkeeper the expenses of advertising and an indemnity, and demanded the notes to be given to him. The shopkeeper refused. The finder brought trover against the shopkeeper, and was held to be entitled to recover the notes.<sup>1</sup>

Bank bills pass under a bequest of "money" or "cash."<sup>2</sup>

§ 655. **Bill-holders, their Rights and Privileges.** — It has been said, and with evident justice, that bill-holders ought to be entitled to protection in preference to other creditors of the bank. They are in fact the public; and though they are not legally obliged to receive bank bills in payment, yet custom and courtesy make it in most cases morally obligatory upon them to do so, such being the ordinary and universal course of dealing between man and man. They are not, like most of its other creditors, dealing with the bank with the expectation of mutual advantage. But obvious as is the propriety of affording a preferential protection to the community at large in the persons of those who may at any time happen to be the holders of bills of a failed bank, yet it is a matter which can only be accomplished through the medium of legislation. In default of statutory provisions the law, as administered by judges, is impotent in the premises, and the bill-holders occupy a like position with all other classes of creditors.<sup>1</sup> Laws, however, have not unfrequently been passed for the purpose of correcting this evil; and the shareholders have been declared liable, to a greater or less extent, to contribution for the benefit of the owners of the circulating paper.<sup>2</sup> The litigation under such statutes has been very much less than might have been expected. The course and result of that which has arisen has necessarily depended in each case very much upon the peculiar language of the law. It is fully discussed in the chapter on "Shares and Shareholders."

<sup>1</sup> § 654. *Bridges v. Hawkesworth*, 15 Jur. 1079. See *New York etc. Railroad Co. v. Haws*, 56 N. Y. 175 (1874); *Tancil v. Seaton*, 28 Gratt. (Va.) 601 (1877).

But the finder of a bank bill acquires no title as against the owner, and if a bank has paid money to a finder of notes which have never been issued it may recover the amount of money so paid. *Pelletier v. State National Bank*, 114 La. 174, 38 So. 132 (1905).

<sup>2</sup> *Stuart v. Bute*, 11 Ves. Jr. 662; *Miller v. Race*, 1 Burr. 457; *Chapman v. Hart*, 1 Ves. Sen. 271.

<sup>1</sup> § 655. *Cochituate Bank v. Colt*, 1 Gray (Mass.) 382.

<sup>2</sup> *Robinson v. Bank of Darien*, 18 Ga. 65; *Grew v. Breed*, 10 Met. (Mass.) 569; *Cochituate Bank v. Colt*, 1 Gray (Mass.) 382.

§ 656. **An Irregularity in the Original Organization** of the corporation, which, had the matter been pressed, might at any time have resulted in the forfeiture of the charter, will not operate to relieve the shareholders from their liability for the ultimate redemption of the circulating notes.<sup>1</sup> But any individual shareholder who took any part in the irregular organization cannot recover anything from another shareholder upon any notes he himself may happen to hold.<sup>2</sup> If a bank, for the purpose of redeeming its circulating paper, makes a valid assignment of assets sufficient for that purpose, it is incumbent upon the shareholders, who are ultimately liable for the redemption, to keep such supervision as may be deemed requisite over the transactions of the assignees. If these persons embezzle or misappropriate or waste the assets, the shareholders still remain liable to make good the deficiency. The assignees are in fact agents of the shareholders. The bill-holders are merely beneficiaries, without being active parties to the arrangement or able to veto it; they are accordingly under no obligation to maintain any watch over the assignees and will not be required to suffer for their default.<sup>3</sup>

If the charter of the organic law reserves a power to the legislature to alter or modify any of the provisions of such charter or law, a statute may at any time afterward be passed to render the shareholders liable for the circulation. The reservation in the charter or law prevents the subsequent enactment from being unconstitutional. It has also been held that, if the natural construction of the later statute expresses a clear intention to cover all corporations which it can legally cover, all those which were capable of such modification would be considered as coming within its terms.<sup>4</sup>

§ 657. **Liability of Officers.** — Unfaithful management on the part of the bank officials, which renders them liable to the corporators, does not necessarily render them also liable to the bill-holders.<sup>1</sup> Even if they could be held to such a liability, the Statute of Limitations will run in their favor. If the statutory period has elapsed since the malfeasance or negligence took place, *a fortiori* if it has elapsed since the failure or stoppage of the bank, the liability will be at an end.<sup>2</sup>

<sup>1</sup> § 656. McDougald v. Bellamy, 18 Ga. 411; McDougald v. Lane, *id.* 444.

<sup>2</sup> Robinson v. Lane, 19 Ga. 337.

<sup>3</sup> *Ibid.*

<sup>4</sup> *In re Reciprocity Bank*, 29 Barb. (N. Y.) 369; 22 N. Y. 9.

<sup>1</sup> § 657. Branch v. Roberts, 50 Barb. (N. Y.) 435.

<sup>2</sup> Hinsdale v. Larned, 16 Mass. 70.

§ 658. A Bank Bill stolen from the Bank and fraudulently put in circulation is good as against the bank in the hands of any *bona fide* holder for value, provided the bill was *completed* in its execution as an instrument at the time of the theft. But if it was *incomplete* in any material respect, and this defect was fraudulently supplied subsequently to the robbery, then its redemption cannot be enforced.<sup>1</sup> The cited case was argued by eminent counsel, and excited unusual interest at the time. The bills sued upon had been completed in every respect with the exception of the president's signature. In this condition they were put away in the cashier's desk, a place of very slight security, and were thence stolen; the president's signature was forged, and they were placed in circulation. Of course the bank had never executed its promise, and so was not technically liable. But the plaintiffs among other arguments, urged that the bank should be held liable, on the ground that it had been guilty of gross negligence in leaving the bills thus exposed when they were in a state so nearly perfect. The court, however, held that no case was made out. The fact that the independent crime of forgery necessarily intervened between the theft and the issuing, and was indispensable to the possibility of issuing, rendered it impossible to hold the bank.

§ 659. **Payment or Deposit of Forged Notes.** — Payment made in forged bank bills is no payment; whence it follows that a deposit of forged bank bills in a bank, though credit therefor be at the time given to the depositor, does not create a debt from the bank to him. So soon as the falsehood of the bills is discovered, the receiver of them may recover back or recoup the amount. This is under the general rule of law, that in every sale of personal property the vendor impliedly warrants it to be in fact what it is described and purports to be, and that he has a good title and right to transfer. A forged bank bill is in fact *not* a bank bill.<sup>1</sup> A

<sup>1</sup> § 658. *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Gloucester Bank v. Salem Bank*, *id.* 33; and see *Baxendale v. Bennet*, 3 Q. B. D. 525 (1878), a case illustrating the same principle, though not a bank-note case. The forgery, not the previous neglect, was the proximate cause of loss.

Mere possession makes out a *prima facie* case in favor of the holder. But if the bank proves that one is not a *bona fide* holder it may recover from him the money which it has previously paid on bank bills held by him. *Pelletier v. State National Bank*, 114 La. 174, 38 So. 132 (1905).

<sup>1</sup> § 659. *Young v. Adams*, 6 Mass. 182; *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Cabot Bank v. Morton*, 4 Gray (Mass.) 156; *Markle v. Hatfield*, 2 Johns. (N. Y.) 455; *Herrick v. Whitney*, 15 *id.* 240; 5 Taunt. 488; *Ramsdale v. Horton*, 3 Pa. St. 330; *Eagle Bank v. Smith*,



counterfeit is not money or cash, as the act of transfer represents it to be, but a nullity, and the debt remains undischarged.

But the receiver of forged notes must give prompt notice upon discovery of the fact, and what is reasonable diligence is a question of fact on the circumstances of each case.<sup>2</sup> Six months,<sup>3</sup> four months,<sup>4</sup> two months,<sup>5</sup> fifteen days<sup>6</sup> (where the notes received purported to be those of the receiving bank), have been held too great a delay after discovery.

(a) And where a payment or deposit is made in bills purporting to be those of the receiving bank, the means of information are not equally within the reach of the parties. The bank is properly held to greater diligence as to its own pretended obligations than a stranger, and if the bank is negligent in receiving the bills, or in failing to discover the forgery, or to give notice after discovery, and the error cannot be corrected without placing the depositor (he being innocent) in a worse position than if the bank had discovered the fraud at once on presentation, and refused the bills, the bank cannot return them. (1) This is holding the bank on the ground of negligence and damage. (2) It cannot be held on the ground of ratification until it knows the fact of the forgery. (3) But there is another ground of liability, which we have noticed in speaking of the responsibility of a bank for a notary or correspondent; namely, the fact that the bank occupies the best position to prevent loss, and that its negligence is a difficult question, involving costly suits, and that, as the diligence proper to the case is very near the line of absolute responsibility, it is best for the welfare of the public to hold the bank absolutely to bear the loss, as between itself and the depositor in good faith. The last rule does not commend itself in this class of cases, for the complications and distant investigation that are incident to questions of liability of correspondents, and in railroad cases, etc., are absent here. At all events it should be clearly kept in mind that on neither the first nor the third ground can the bank be denied the right of return if it will not prejudice the depositor. .

§ 660. **From the Gloucester Bank Case** it seems that if the

5 Conn. 71; *Pindall v. N. W. Bank*, 7 Leigh (Va.) 617; *Mudd v. Reeves*, 2 H. & J. (Md.) 368.

<sup>2</sup> *Simms v. Clark*, 11 Ill. 137.

<sup>3</sup> *Raymond v. Baar*, 13 Serg. & R. (Pa.) 318.

<sup>4</sup> *Pindall v. N. W. Bank*, 7 Leigh (Va.) 617.

<sup>5</sup> *Thomas v. Todd*, 6 Hill (N. Y.) 340.

<sup>6</sup> *Gloucester Bank v. Salem Bank*, 17 Mass. 44.

bills were paid in and credit was given at once in the hurry of business hours, and that if on the first possible opportunity afterwards on the same day the bank officers should examine the bills, find them forged or false, and at once notify the depositor, the repudiation would be in time to save the bank, at least unless the depositor had suffered substantial injury by reason of the delay. *The bank should have a reasonable time to examine the bills*; and though this limit of reasonable time should be construed with great strictness and so as to hold the bank to great promptitude, still it could hardly be said that the receiving officer should pause in the midst of business hours to examine the marks of identification on each one of a large number of bills. It has been well said, that in such cases the bank must be allowed to put some, at least temporary, confidence in its customers. In the cases named bills purporting to be of the Gloucester Bank were handed to its cashier in his absence from the bank. In return he gave a cashier's check for the amount. The court said that, if they had been examined promptly upon their coming into the bank, and at once rejected, this would have been in time to save the bank, which could not be considered to have actually taken its notes in payment until it had had time to examine and count them; but since it had put them away for several days before making such examination, it must be held to have adopted them. In this case it was not questioned but that the party paying in the false bills did so in good faith. If he were guilty of any species of fraud, of course the bank would be relieved thereby, as towards him, from the ordinary consequences of its laches. *The Bank of United States v. Bank of Georgia*<sup>1</sup> is quoted as authority that a bank receiving bills purporting to be its own adopts them, and cannot afterwards be heard to say they were forged. The court said, in substance, that in general a payment in forged paper is not good, and if there be no negligence the consideration may be recovered or suit brought on the original demand.

But this principle does not apply to the case of a bank receiving on deposit as cash its own notes, actually issued by it but fraudulently altered while in circulation. The bank has the means of knowing if the notes are genuine; if these means are not employed, it is evidence of negligence. The taking of its own bills in such an absolute manner is an adoption of them. "Proof of actual damage may not be within reach of the depositor, and

<sup>1</sup> § 660. 10 Wheat. 333, 6 L. ed. 334 (1825).

therefore to confine the remedy to cases of that sort would fall far short of the actual grievance. The law will therefore presume a damage, actual or potential, sufficient to repel any claim against the holder." This certainly will not stand as a principle of law. It is in discord with the whole tone of the law to hold that, when A. has made a mistake, he shall not recover the money because B. is presumed to be damaged. And even if such a principle could be admitted, it could not prevent recovery if the bank could show positively that B. had not been damaged by the delay. The court goes beyond the facts of the case for the judge says that the bank was negligent, since by ordinary examination the fraud would have been discovered, and no notice was given to the depositor till eighteen days after the deposit. The analogy of the old cases on forged bills is relied on, and *Price v. Neale* quoted. (But the old idea that a bank must be held absolutely to know the signature of its correspondent is exploded.) Moreover, the court quotes without dissent, but among the authorities upon which its decision is based, these words from *Gloucester Bank v. The Salem Bank*: "The true rule is that the party receiving such notes must examine them as soon as he has opportunity, and return them immediately. If he does not he is negligent, and negligence will defeat his action. This principle will apply in all cases where forged notes have been received, but certainly with more strength when the party receiving them is the one purporting to be bound to pay." On the whole, therefore, this *United States Bank* case is not authority for denying that a bank may return such notes if an examination is made within a reasonable time. So far as its language affirms this, it is *obiter*, and based on a dead analogy, and inconsistent with the living authorities quoted as its own warrant.<sup>2</sup>

§ 661. **Change of Numbers Vitiates.** (See § 650 A.) — The Bank of England stopped payment of certain of its notes payable to bearer, giving notice of their numbers. T. altered the numbers. S. bought the bills in good faith and for value. It was held that the alteration did not affect S.'s right of action against the bank;<sup>1</sup> but on appeal this was reversed, the court saying that, although the change did not vary the contract, it was an alteration in an essential part, and vitiated the notes.<sup>2</sup> In this case the court dis-

<sup>2</sup> *Bank of United States v. Bank of Georgia*, 10 Wheat. 333, 6 L. ed. 334.

<sup>1</sup> § 661. *Suffell v. Bank of England*, 7 Q. B. D. 270.

<sup>2</sup> *Suffell v. Bank of England*, 9 Q. B. D. 555 (1881).

sented from *Caldwell v. Parker*,<sup>3</sup> which decided that erasure of the signatures to a deed of indemnity after execution did not avoid the deed.

§ 662. **Warranty of Solvency.**—If the transferrer warrants, or represents that the notes are good for their face, or agrees to take the risk, he is held.<sup>1</sup> But in the absence of agreement to the contrary, bank bills are circulated upon the credit of the bank which issues them, not upon that of any individual who pays them over to another. Hence it follows that there is no warranty of value, or of ultimate payment, upon the transfer of a bank note; though it is probable that there is a warranty of its genuineness, as being in fact a note for the amount named on its face, issued and payable by the bank by which it purports to have been issued and to be payable.<sup>2</sup>

If a payment is made in bank notes, (1) and the bank is solvent at the time of payment, any loss by subsequent insolvency falls on the payee; but (2) if the bank is insolvent at the time of payment, the authorities are not agreed, in case the parties are ignorant of the insolvency. Of course if the payer knew of that fact, and did not disclose it, no court would sustain the payment.<sup>3</sup>

(a) **In New York**<sup>4</sup> it was held that “the law is well settled that where the note of a third person is received in payment of an antecedent debt, the risk of his insolvency is upon the party from whom the note is received, unless there is an agreement or understanding between the parties, either express or implied, that the party who receives the note is to take it at his own risk. The same principle is applicable to the notes of an incorporated bank, except that as to the latter there is always an implied understanding between the parties that, if the bill at the time it is re-

<sup>3</sup> Ir. Rep. 3 Eq. 519 (1869).

<sup>1</sup> § 662. *Jefferson v. Holland*, 2 Del. Ch. 116 (1820); *Corbit v. Bank of Smyrna*, 2 Harr. (Del.) 235; *Frontier Bank v. Morse*, 22 Me. 88; *Aldrich v. Jackson*, 5 R. I. 218; *Commonwealth v. Stone*, 4 Met. (Mass.) 43; *Gilman v. Peck*, 11 Vt. 516; *Wainwright v. Webster*, 11 Vt. 576; *Hellings v. Hamilton*, 4 Watts & S. (Pa.) 462; *Markle v. Hatfield*, 2 Johns. (N. Y.) 455.

<sup>2</sup> *Edmunds v. Digges*, 1 Gratt. (Va.) 359.

<sup>3</sup> *Commonwealth v. Stone*, 4 Met. (Mass.) 43.

<sup>4</sup> *Ontario Bank v. Lightbody*, 13 Wend. (N. Y.) 104. See also *Houghton v. Adams*, 18 Barb. (N. Y.) 545; *Harley v. Thornton*, 2 Hill (S. C.) 509; *Townsend v. Bank of Racine*, 7 Wis. 185; *Fogg v. Sawyer*, 9 N. H. 365; *Westfall v. Braley*, 10 Ohio St. 188.

ceived is in fact what the party receiving it supposes it to be, he is to run the risk of any future failure of the bank."

But to hold the transferrer on this warranty of solvency at the time of transfer, the transferee must within a reasonable time present the bills for payment, or put them in circulation. The loss will fall on the transferee if by ordinary diligence he could have prevented it.

(b) **In Delaware**<sup>5</sup> directly the contrary is held. "When a bank note is given *bona fide* and received without objection, in exchange for goods, money, notes, or bills, or on general deposit by a bank, and there is no agreement or understanding, express or implied, between the parties as to which of them shall stand the risk of the then or future solvency of the bank issuing such a note, the party thus receiving such a note assumes all the risk of its solvency, and is without remedy against the person from whom he thus received it, although it may afterwards appear that the bank issuing such note had at the time of the transaction failed."

(c) The Delaware rule is certainly in far better accord with business usages and the analogies of the law. Bank bills are circulated on the credit of the issuing bank, not on that of the individual paying them; they are intended to circulate indefinitely, and it would render commercial transactions very uncertain and indefinite to hold that *bona fide* payments could be opened up in this way. There is no warranty of value or of ultimate payment on the transfer of a bank note.<sup>6</sup>

Gibson's remarks in *Bayard v. Shunk* make this matter so clear that we quote them at some length: "The assertion that it is always an original and subsisting part of the agreement that a bank note shall turn out to have been good when it was paid away, can be conceded no farther than regards its genuineness. That genuine notes are supposed to be equal to coin is disproved by daily experience, which shows that they circulate by the consent of the whole community at their nominal value, when notoriously below it. But why hold a payer responsible for a failure of the bank only when it has been ascertained at the time of the payment, and not for insolvency ending in an ascertained failure

<sup>5</sup> *Corbit v. Bank of Smyrna*, 2 Harr. (Del.) 235.

<sup>6</sup> *Edmunds v. Digges*, 1 Gratt. (Va.) 359; *Bayard v. Shunk*, 1 Watts & S. (Pa.) 92; *Scruggs v. Gass*, 8 Yerg. (Tenn.) 175; *Ware v. Street*, 2 Head (Tenn.) 609; *Lowery v. Murrell*, 2 Port. (Ala.) 280.

afterward? As the bank may have been actually insolvent before it chose to let the world know it, we must carry his responsibility back beyond the time when it ceased to redeem its notes, if we carry it back at all. Were it not for the conventional principle that the purchaser of a chattel takes it with its defects, the purchaser of a horse with the seeds of mortal disease in him might refuse to pay for him, though his vigor and usefulness were yet unimpaired; and if we strip a payment in bank notes of the analogous cash principle, why not treat it as nullity, by showing that the bank was actually, although not ostensibly, insolvent at the time of the transaction? It is no answer to say the note of an unbroken bank may be instantly converted into coin by presenting it at the counter. To do that may require a journey from Boston to New Orleans, or between places still farther apart, and the bank may have stopped in the mean time; or it may stop at the instant of presentation, when situated at the place where the holder resides. And it may do so even when it is not insolvent at all, but perfectly able eventually to pay the last shilling. This distinction between previous and subsequent failure, evinced by stopping before the time of the transaction or after it, is an arbitrary and impractical one. To such a transaction we must apply the cash principle entire, or we must treat it as a transfer of negotiable paper, imposing on the transferee no more than the ordinary mercantile responsibility in regard to presentation and notice of dishonor. There is no middle ground. But to treat a bank note as an ordinary promissory note would introduce endless confusion, and a most distressing state of litigation. We should have reclamations through hundreds of hands, and the inconvenience of having a chain of disputes between successive receivers would more than counterbalance the good to be done by hindering the crafty man from putting off his worthless note to an unsuspecting creditor. No contrivance can prevent the accomplishment of fraud, and rules devised for the suppression of petty mischiefs have usually introduced greater ones.

“The case of a counterfeit bank note is entirely different. The laws of trade extend to it only to prohibit the circulation of it. They leave it, in all besides, to what is the rule of both the common and the civil law, which requires a thing parted with for a price to have an actual, or at least a potential existence (2 Kent 468), and a forged note, destitute as it is of the quality of legitimate being, is a nonentity. It is no more a bank note than a

dead horse is a living one; and it is an elementary principle that what has no existence cannot be the subject of a contract. But it cannot be said that the genuine note of an insolvent bank has not an actual and legitimate existence, though it be little worth; or that the receiver of it has not got the thing he expected. It ceases not to be genuine by the bank's insolvency; its legal obligation as a contract is undissolved; and it remains a promise to pay, though the promisor's ability to perform it be impaired or destroyed. But as the stockholders of a broken bank are the last to be paid, it is seldom unable in the end to pay its note-holders and depositors, and, even where nothing is left for them, its notes may be parted with at a moderate discount to those who are indebted to it. We seldom meet with so bad a case as the present, in which everything like effects, and even the vestiges of the bank, disappeared in a few hours after the first symptoms of its failure. But, independent of that, the difference between forgery and insolvency in relation to the transfer of a bank note is as distinctly marked as the difference between title and quality in relation to the sale of a chattel."

(d) When bills are deposited (not those of the depositary) the credit may be cancelled if they are not honored on prompt presentment. M. W. deposited certain country bank notes, payable in London, representing £80 in value, with a banking company, and received the following memorandum signed by the manager: "Received of M. W. £80, for which we are accountable. £80, at 3 per cent interest with fourteen days' notice." The notes were sent on the same evening by post to the London agents of the banking company, and were presented on the next day, and refused payment. They were transmitted by that night's post to the banking company, who, on the following day, gave notice of dishonor to M. W., and tendered to him the notes, which he refused. It turned out that the bank which had issued the notes had stopped payment upon the day when M. W. made the deposit with the banking company, but that neither M. W. nor the company were then aware of this. It was held, that, under the above circumstances, M. W. could not maintain an action, either for money lent or for money had and received, against the banking company.<sup>7</sup>

§ 663. **Pledge of Bills.**—Bills which have been improperly pledged to a creditor of the bank, as security, with the distinct

<sup>7</sup> *Timmis v. Gibbins*, 14 Eng. L. & Eq. 64.

understanding that they shall not be put in circulation, but shall be held strictly by way of security, do not constitute a part of the circulating paper of the bank. The pledgee is not a bill-holder, and is not entitled to any of the rights or privileges which are accorded to bill-holders. He cannot use the bills as bills, but must come in as an ordinary creditor on his debt.<sup>1</sup> It seems that, if a bundle of bank bills be left as collateral security, the same bills are to be kept and returned, and not other bills of an equal value. Thus, where a party borrowed from a bank a certain sum in notes of the Confederate States, and gave to the bank, as security, the like sum in its own bills, it was held that trover would lie to recover the bills, on the ground that the title in the specific bills had not passed, leaving only a debt of that amount due from the bank to the borrower upon return of the Confederate note; but that the identical parcel of bills remained the property of the borrower, who had the right to redeem and receive the same by payment of the borrowed notes.<sup>2</sup>

§ 664. **Issue of Circulating Notes by Banks of States.** — *Not unconstitutional, though they are guaranteed by the State.* — In divers States banks have been established which were, properly speaking, State institutions, and not corporations of the ordinary sort, established by individuals from their private funds and conducted by them for their private benefit. The various institutions of this description do not of course repeat each other in all matters of detail, but those of them at least which have come into the courts resemble each other in their main features, and consequently in the legal character impressed by those features. Formally, a corporation is created. It has its corporate name and seal, its president, directors, and other customary officers of the bank. But the election of the officers is reserved to the legislature. The capital is supplied from the public treasury or from the pledge of public revenues, and the State is the sole stockholder. Further, the State sometimes directly guarantees the ultimate redemption of the circulation; for these banks have been uniformly banks of issue; in fact, the plausible purpose of their creation has usually been the furnishing of a stable and reliable currency for the people of the commonwealth. The assumption of this function it is which has caused the constitutionality of the banks and the legality of their notes or bills to be questioned, on the ground that the issuing

<sup>1</sup> § 663. *Davenport v. City Bank of Buffalo*, 9 Paige (N. Y.) 12.

<sup>2</sup> *Abrahams v. Southwestern R. R. Bank*, 1 S. C. N. S. 441.



of these notes or bills was in truth and in substance the emission of bills of credit by the State, in contravention of the provision of the national Constitution. Twice the Supreme Court of the United States have had occasion to hear and determine causes involving this point, and each time, after thorough arguments, the decision has been in favor of the constitutionality of the bank and the validity of its bills or notes.<sup>1</sup>

§ 665. **Bills of Credit.** — The reasoning in the opinions which embody these rulings must be regarded as perfectly satisfactory. The definition of the term “bills of credit” has, not unnaturally, given considerable difficulty to the judges. Perhaps the best is to be found in the cause cited from 11 Peters, which is as follows: “A paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money.” To whatever other criticism this may be open, it certainly must be deemed broad enough. Even if it be conceivable that an instrument could fall within this description and not be a bill of credit, it must at least be admitted that an instrument which does not fall within this description cannot be a “bill of credit” in the sense of the prohibition of the United States Constitution. It does not require much thought to see that the bills or notes issued by the bank of a State do not display these characteristics. They are not issued by the sovereign power, not even by an agent, at least in a legal sense, of the sovereign power. They are issued by an independent corporation, having every essential and customary attribute of a complete and perfect corporate banking company. *They are not issued upon the credit or faith of the State. They do not on their face bear any promise or pledge by or even on behalf of the State for their redemption.* The directors of the bank have no authority to offer such a pledge. On the contrary they put forth instruments whose promise purports to be and is based upon the corporate responsibility solely. The corporation may be sued on the bills. *It has assets and a capital. It is upon the faith or credit of these primarily and immediately that the circulating notes are issued, or must be conclusively presumed to be issued.* A contingent and remote undertaking of the State finally to redeem them if the bank is unable to do so, does not in the view of the law, constitute the credit upon which they are issued to circulate.

<sup>1</sup> § 664. *Briscoe v. Bank of the Commonwealth of Kentucky*, 11 Pet. 257, 9 L. ed. 709; *Darrington v. Bank of the State of Alabama*, 13 How. 12, 14 L. ed. 30; *Owen v. Branch Bank at Mobile*, 3 Ala. 258.

*Real Cases of Bills of Credit*

(a) A case which came into the Supreme Court from the State of Missouri is useful in this connection, as demonstrating by contrast the accuracy of these positions.<sup>1</sup> In that case promises to pay were issued under legislative authority; they were signed and countersigned, and offered to the public by State officials; they were to be redeemed in a designated manner also by State officials out of public moneys; they ranged in denomination from fifty cents to ten dollars each. It could not be questioned that these were properly "bills of credit." When the genuine bill thus appears in its proper shape, it appears as a very different article from the bank notes of the Bank of the State of Alabama or of the Bank of the Commonwealth of Kentucky. This brief disposition of the topic suffices only for stating what must be deemed a doctrine established beyond possible question hereafter, and which, as such, would not justify a longer discussion here; but the cited cases, especially that in 11 Peters, are very exhaustive, and deserve thorough examination if the complete history of the discussion is sought for.

§ 666. **Miscellaneous Rulings.** — Statutory provisions restricting banks from issuing the bills of banks not incorporated within the same State have been quite common. In their absence, a bank may of course pass over its counter and circulate any species of money not absolutely illegal which the customer will take.<sup>1</sup> Such laws do not, however, prevent the sale of foreign bills by one bank to another, simply for the purpose of facilitating their redemption.<sup>2</sup> But if a bank in another State establishes, in a State where such legislation exists, an agency to discount bills with its own bank notes, this would be a violation of the law. The bank would acquire no title to the bills so discounted, and could not maintain a suit for their collection.<sup>3</sup> A much finer distinction was drawn in a case decided in the State courts of Alabama,<sup>4</sup> — a distinction which seems rather too subtle to be generally adopted, but which shall be given for consideration. A banking company, it was held, receiving from a foreign banking corporation bills of

<sup>1</sup> § 665. *Craig v. State of Missouri*, 4 Pet. 410, 7 L. ed. 903.

<sup>2</sup> § 666. *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120.

<sup>3</sup> *Buffalo City Bank v. Codd*, 25 N. Y. 163.

<sup>4</sup> *Bowman v. Cecil Bank*, 3 Grant (Pa.) 33.

<sup>5</sup> *Wray v. Tuskegee Ins. Co.*, 34 Ala. 58.

that corporation upon *general* deposit, would be entitled to pay them out again, since they would be simply its own money. Neither would it make any difference that it had agreed with the foreign bank to redeem all such bills presented at its counter. It is not the agent of the foreign bank to "issue" such bills, in which case there would certainly be a violation of the statute. The decision, it was intimated, might have been different, had the declaration alleged a *special* deposit of these bills to the end that they should be paid out as money for the benefit of the depositor. Where the same law in one section declares it to be a misdemeanor to "pass or receive" notes below a certain denomination, and in another section inflicts the penalty of a fine upon a bank which "makes or issues" such, the former section does not apply to a bank paying such over its counter. The latter section is exclusive of the other, and can alone be enforced against the corporation.<sup>5</sup>

A statute "to prohibit" the issuing and circulating of unauthorized bank paper creates a liability in tort, and not in contract, for its breach.<sup>6</sup> A principle, which would seem too obvious to require judicial sanction, has been declared in Massachusetts, that a bank cannot issue bills or notes upon the basis of a "special" deposit.<sup>7</sup> This deposit could not be used for their redemption; it cannot be availed of in business transactions to produce profit and increase the funds of the bank. The bank has not even the right to meddle with it temporarily further than is essential for its safe-keeping. In Pennsylvania the State law required banks to keep their circulation at par, and imposed a forfeiture amounting to a certain percentage upon their circulating paper if they failed to do so. It was held by the courts that the phrase "at par" signified ordinarily equivalent to gold and silver for financial and commercial purposes; also that the forfeiture was in the nature of a penalty, not of a tax.<sup>8</sup>

<sup>5</sup> *State v. Bank of Fayetteville*, 3 Jones, Law (N. C.) 450.

<sup>6</sup> *Lawler v. Burt*, 7 Ohio St. 340.

<sup>7</sup> *Foster v. Essex Bank*, 17 Mass. 479.

<sup>8</sup> *Harrisburg Bank v. Commonwealth*, 26 (Pa.) 451.

## CHAPTER XLI

### STOCKS AND STOCKHOLDERS

#### A. LIABILITIES OF STOCKHOLDERS.

I. A subscriber (one who signs the articles of association, <sup>674</sup> with a §§ 668-674. certain number of shares opposite his name) is liable for the full amount of his original subscription; <sup>668</sup> and this liability is not discharged by

- (a) The invalidity of the subscription of another, <sup>670</sup>
- (b) Nor the provision for forfeiture <sup>670</sup> of the stock in case of non-payment, this being a cumulative remedy,
- (c) Nor any irregularity <sup>669</sup> in the organization of the bank,
- (d) Nor a release <sup>671</sup> from the directors (except as to creditors after the release),
- (e) Nor the Statute of Limitations <sup>672</sup> (for this does not run so long as the bank does business),
- (f) Nor a transfer of his rights as a subscriber (before issue of stock), unless the transferee is accepted by the bank, <sup>673</sup>
- (g) Nor a plea of failure of consideration by reason of the vanishing of all hope of dividends, nor even the return of the principal from the ruined corporation

Will avail to relieve a subscriber, so long as there are *bona fide* creditors of the bank.

But a subscriber is relieved by

- (h) A discharge in bankruptcy, <sup>671</sup>
- (i) Subscription induced by fraud,
- (j) Or a transfer of his rights as subscriber (the transferee being accepted by the bank in good faith), <sup>673</sup>
- (k) Or by a failure of an attempted increase of stock for want of sufficient subscriptions. <sup>670</sup>

§ 669. The debt of a subscriber subsists independently of a note he gives for it.

§ 719. Stockholders who pay their subscriptions in notes of the bank are allowed only what they gave for the notes.

§ 719. An ostensible increase of stock must be paid up for the benefit of creditors.

#### II. A stockholder may be liable beyond his original subscription.

§§ 675-686. (a) By agreement, as when the corporation is held out to the world as a partnership.

(d) By statute.

§ 675. (1) The measure of liability is very different in different States, the commonest being that the stockholders

shall be held to redeem the bank notes fully, and to pay the just debts of the bank to the extent of a sum equal to the par value of the stock held by them.

§§ 676, 677. (2) The legislature can always give a new "remedy", *i.e.*, a new process for recovery upon an existing liability,<sup>677</sup> but cannot *after organization* of the bank, create any responsibility beyond that attaching of common law (*viz.*, the loss of the amount paid on shares or subscribed), unless such power is reserved in the law under which the bank is organized.<sup>676</sup>

§ 678. (3) *The Statute of Limitations* runs from the time a right of action accrues; in case of deficiency of capital at the time of loss, in case of redeeming circulation, etc., from the insolvency of the bank.

§§ 679-686. (4) *Who is liable as a shareholder* is to be determined by the apparent ownership (unless the appearance is without fault<sup>679</sup> of him whose name appears on the books), and by the real beneficial ownership.<sup>680</sup>

If P.'s name (though he is only a pledgee) once appears on the books as owner by his consent, he cannot avoid his liability by a colorable transfer to C. on the understanding that the stock is to be retransferred on request, nor by any transfer to an irresponsible person.<sup>681, 683</sup>

Nor can a *purchaser* avoid liability by having the transfer made in the name of an irresponsible person.<sup>683</sup>

But a pledgee may gain the security of the stock as a pledge, and yet avoid liability as a shareholder by having the transfer from the bailor, B., to an irresponsible person, D.<sup>684</sup>

D. is liable as apparent owner; B. is liable as the beneficial owner, and, as the last apparent owner, responsible. But P. is neither the beneficial owner, nor has he ever appeared on the books.

In Ohio, in case of transfer, the assignee is primarily liable, and impliedly contracts to indemnify the assignor for all subsequently accruing calls; but after liability attaches to one as a stockholder, he cannot shake it off by assignment.<sup>682</sup>

§ 686. *Liability of estate of deceased stockholder.*

§ 696. (5) *Who can sue.* A stockholder, who is also a creditor, cannot sue a brother stockholder on his statute liability, for that would give a practical set-off, and defeat the protection of outside creditors intended by the law. Outside creditors may sue, and the receiver, if authorized. See next paragraph.

§ 693. (6) *Form of suit.* In some States, the suit may be at law against a single stockholder, and he has his remedy over the contribution. In others, a bill in equity is the proper form of suing, and this is certainly far more just. The best plan is that of the national banking law, where the receiver enforces the liability of the stockholder, as this saves all extra suits and questions of prior recourse against the bank, and brings the whole matter under one control, so that a calculation of the extent to which each stockholder must be assessed is easy, and the numerous complications resulting from lawsuits against single stockholders are avoided.

II. § 50.  
§ 12.

## STOCKS AND STOCKHOLDERS

- § 687. (7) Whether recourse must be had to the bank before suing the stockholders is disputed.
- § 688. A judgment against the bank is only *prima facie* evidence against a stockholder.
- (8) Extent of liability in a suit against a stockholder is determined by the following proportion :
- § 694. As the whole stock is to the defendant's portion of stock, so is the whole indebtedness for which the stockholders are liable to the portion of it that the defendant is to pay. From this is to be taken any portion of this indebtedness that said defendant has already paid. But otherwise he cannot offset a debt due him from the bank.
- § 689. *Interest* can be recovered only from the date of demand on the defendant individually.  
In Massachusetts, no interest is allowed.  
A creditor can recover only what he paid on claims bought at a discount after the failure of the bank.
- § 695. (9) Defences.
- § 690. If the creditor knew or ought to have known that in contracting the debt the directors exceeded their power, he cannot recover.
- (10) Contribution
- § 692. May be enforced against other stockholders by one who has paid more than his share, except that an officer guilty of malversation cannot sue a stockholder.
- § 369 A. Distribution of funds collected from shareholders.

### B. LIEN OF A BANK ON ITS STOCK.

- (1) Creation. See General Principles of Lien, § 323.
- § 698 A. (a) A national bank is forbidden to loan on its stock, and a lien being inconsistent with this, no provision in the articles of association or by-laws can create such a lien.
- § 697. (b) As to State banks, there is no common-law lien, but an adverse common-law right of the stockholder to transfer his property.
- (1) The charter may give a lien ; also
- § 698 A. (2) The articles of association.
- §§ 697, 698. (3) So, if there is a usage or a by-law giving a lien, and the stockholder knows of it at the time he borrows of the bank, his assent is justly presumed, and the lien is good against him and his assignee in insolvency, and any assignee with notice.
- § 698. (4) As to an assignee without notice, the effect of a by-law lien (not authorized by a higher law) is doubtful ; probably he is not affected.  
If the assignee has no notice *either of the debt* or the by-law, he takes an unimpeachable title, under the rules of negotiability.
- (2) Effect.
- Any transfer in derogation of a valid lien is of no effect as against the bank. Often the lien is protected by a rule that no transfer shall be made so as to bind the bank, except on the books of the corporation. But after the bank has notice of a transfer, it cannot hold the shares
- § 699.

## STOCKS AND STOCKHOLDERS

- against the assignee for any subsequently created debt of the assignor.
- § 702. The lien secures a debt not yet mature (Maryland *contra*), and attaches to the whole stock of the debtor; no part of it can be sold by him. § 329.
- § 700. But the bank, after using its lien, and applying the stock to its debt, is postponed, as to the rest of the debtor's property, to the other creditors.
- (3) Waiver.
- § 701. (a) Other security taken by the bank will release the stock (unless the lien is reserved expressly), but the tender of other security not accepted by the bank will not release the stock; the bank cannot be compelled to exchange securities. See § 330.
- § 704.
- § 701. (b) By allowing a transfer on the books, without expressly reserving its lien, it is waived.
- (4) The *Statute of Limitations*,  
 When it affects only the right of action, and does not destroy the debt, has no effect on a lien, for it is appurtenant to the debt.
- § 701.
- (5) *Sureties*
- § 703. Who pay the bank are subrogated to its rights, lien and all.
- C. SHAREHOLDER'S RIGHTS.
- § 706. (1) To surplus assets after the bank's debts are paid.
- § 692. (2) To contribution, when paying more than a due share.
- § 706 A. To assets upon reduction of capital stock.
- § 707. (3) To new shares. Existing shareholders have the first right to subscribe for new shares issued after all the original capital stock is subscribed for, in proportion to the shares they already hold.
- (4) To dividends.
- § 708. Demand must be made at a time when it is the bank's duty to pay, before suit can be brought.
- § 716.
- § 708 A. To inspect books, records, and documents.
- § 720. (5) To restrain officers from wrongful acts by injunction, in some cases, as wrongful alienation of property.
- (6) To sue the directors for mismanagement, gross neglect, or malfeasance in office, whereby loss accrues. The suit may be in tort. Declaring dividends from the capital instead of from profits is a cause of action. In case of a national bank, the receiver may sue the directors (when there are no proceedings for forfeiture) unless the receiver himself is one of the guilty officers; then the stockholders may sue. But a New Jersey case holds (on grounds that apply to all banks) that a stockholder cannot sue the directors for official default, for they are officers of the bank; there is no privity with the stockholders, and besides, anything recoverable is assets of the bank, upon which its creditors have the first claim.
- § 717.
- (7) To transfer stock.
- If the bank has a valid lien (B above), or the required formalities are not observed, it may refuse to allow a transfer on its books; otherwise the purchaser may
- § 709.
- § 714.

- sue the bank for refusal, and recover the value of the stock, as for a conversion.
- §§ 711, 714. The bank is liable for allowing a wrongful transfer.
- § 715. Specific performance of a contract to sell shares will not be enforced if the object is to gain control of the bank. Public policy forbids.
- As between an assignee under an unrecorded transfer and an attaching creditor,
- (a) If there is no positive law declaring that transfers not recorded on the books of the bank are void as to creditors, or requiring specific acts to create a valid transfer, the principle that creditors take their debtor's property subject to all *bona fide* liens and equitable transfers will prevail.
- § 710. (b) If the general law provides that transfers shall only be made on the books, declaring, like registry laws, that no unrecorded title shall be good, or only against those with actual notice, Maine, Massachusetts, and Connecticut hold that the creditor prevails.
- § 712. (c) Connecticut holds that if the by-laws declare that transfers shall be made only on the books, no other transfer is good for any purpose.
- § 710 a. (d) If the provision is that transfers shall be made "only on the books of the bank, and on surrender of the certificates,"
- § 711. Neither the attaching creditor nor the transferee has conformed to the requirements for a legal title, the transferee has not recorded, and the creditor cannot surrender the certificate. As the matter is left to the equities, if both have acted in good faith, the prior right of the transferee should prevail.
- § 713. (e) The better opinion is, that all such provisions are intended merely for the benefit of the bank (determining who shall vote as a stockholder, and to whom dividends may safely be paid, and protecting any lien the bank may have), and not at all for the benefit of any third parties, and that stock is negotiable by delivery of the certificate with an irrevocable power of attorney to have the transfer made on the books.
- § 710. Cal.
- § 713. Therefore, one who takes stock in this way, *bona fide* for value, without notice of prior equities, has a clear title against all but the bank.
- § 713. One who took from a pledgee, who held the certificate and power, without notice of the pledgor's rights, held against the latter.
- § 720. D. MANDAMUS TO ENFORCE TRANSFER.
- E. THE BANK AS A SHAREHOLDER.
- (1) A bank may take its own stock to *save* a debt.
- § 716. (2) In some States, banks may loan upon their own stock, or
- § 77. even purchase it.
- § 59. Usually this right is limited, and national banks are prohibited from exercising it.
- II. § 35.



## F. SOVEREIGN STATES AS SHAREHOLDERS.

§ 718. Have the same rights as other shareholders, and cannot, by legislation, appropriate to themselves more than their fair share of the assets.

§ 718 *a.* The same rule holds when the State is a *depositor*.

G. A shareholder may become a competent witness for the bank by assigning his stock. § 113 *b.*

§ 668. **Liability of Subscribers for the full Amount of their Subscriptions.** — The obligation of payment upon a subscription for shares in the capital stock of a banking corporation is created and perfected by the act itself of subscription. In the absence of a proviso to the contrary, the whole amount is payable immediately upon demand. But it may be stated that it shall be demanded only in instalments of specified amounts, respectively, to be called for not before certain periods; and the statement will enter into and become a valid part of the contract of subscription, except in cases where it conflicts with the charter or the organic law under which the corporation exists. But no statement, however explicit, in the original contract of subscription, can relieve the subscriber from the ultimate necessity of paying the full par value of the full number of shares he subscribes for, so long as any creditors of the corporation remain unpaid.<sup>1</sup> In the absence of an enabling statute the payment must be in cash or specie, and cannot be made in notes, or judgments, etc.<sup>2</sup>

§ 669. **The Expedients to which Shareholders** who have only paid a portion of the par value of their shares have resorted, in order to avoid further payments after the corporation has proved unsuccessful, are very numerous. But they have uniformly met with well-deserved failure, at least so long as *bona fide* debts of the bank were outstanding. Among the most common of these subterfuges has been an agreement or understanding entered into

<sup>1</sup> § 668. *Palmer v. Lawrence*, 3 Sandf. (N. Y.) 161; *Lewis v. Robertson*, 13 Sm. & Mar. (Miss.) 558.

<sup>2</sup> *Coddington v. Canaday*, 157 Ind. 243, 61 N. E. 567 (1901). See also *Davis v. Burns*, 173 S. W. 476 (Tex. Civ. App.) (1915).

While the bank is solvent the liability can only be enforced by assessment made in conformity with the by-laws of the corporation. *Covell v. Fowler*, 144 Fed. 535 (1906).

Nor can the depositors maintain a creditors' bill to reach unpaid subscriptions, even where the bank has become insolvent and a receiver appointed at the instance of the attorney general. *Drennen v. Jenkins*, 180 Ala. 261, 60 So. 856 (1913).

<sup>3</sup> But if instalments for subscription are not paid, the directors may declare the stock and previous payments forfeited to the corporation. *First State Bank v. First State Bank*, 145 S. W. 691, Tex. Civ. App. (1912).

at the time of subscription between the subscriber and the directors, to the effect that only a partial payment, or sometimes even no real payment at all, shall be demanded. Notes of the nominal subscriber are then given, upon which it is agreed that no collection shall ever be demanded.<sup>0</sup> The shares are or are not actually transferred, as the case may be; but whether transferred or not, they are always regarded as the property of the bank, while at the same time the direction is able to assume that all the stock has been taken and paid for. Want of consideration, it has been held, cannot be set up in suits upon such subscriptions or notes.<sup>1</sup> An irregularity in the organization of the corporation, whether intentional and fraudulent, or merely accidental, has also often been urged as a ground for invalidating stock subscriptions, at least so far as they have not been already paid up.<sup>2</sup> But *this plea cannot be sustained to the injury either of corporate creditors or of subsequent bona fide purchasers or holders of the stock*, who have taken it without participation in or knowledge of any illegality or fraud. Where there has been fraud, the maxim *in pari delicto potior est conditio possidentis* has been relied upon as a ground why the corporation could not recover. It might avail if the question lay only between the bank and the subscribers; but the corporation in such cases is not regarded as the real or exclusive party in interest. It is rather a trustee for the creditors; and they, who are therefore the real parties, are certainly not *in delicto*.

§ 670. Neither does it relieve any one Subscriber that the Subscription of another is Invalid. — It does not on this account follow that his own subscription is invalid. Each one may be individually sued; and if he would defend, he must set up some matter going to his own individual case, and constituting a part of his own especial dealing or contract with the corporation.<sup>1</sup> That the corporation has been dissolved by the expiration of its charter, or by the judicial forfeiture thereof; or that it has ceased

<sup>0</sup> § 669. See § 719.

<sup>1</sup> *Agricultural Bank v. Burr*, 24 Me. 256; *Litchfield Bank v. Church*, 29 Conn. 137; *Connecticut & Passumpsic River R. R. Co. v. Bailey*, 24 Vt. 465; *Blodgett v. Morrill*, 20 *id.* 509.

<sup>2</sup> *Palmer v. Lawrence*, 3 Sandf. (N. Y.) 161; *Pine River Bank v. Hodsdon*, 46 N. H. 114, and cases cited; *Cowls v. Gridley*, 24 Barb. (N. Y.) 301; *Johnston v. Southwestern R. R. Bank*, 3 Strobb. Eq. (S. C.) 263; *Minor v. Mechanics' Bank of Alexandria*, 1 Pet. 46, 7 L. ed. 47; *McDougald v. Lane*, 18 Ga. 444.

<sup>1</sup> § 670. *Sagory v. Dubois*, 3 Sandf. Ch. (N. Y.) 466; *Litchfield Bank v. Church*, 29 Conn. 137.

to act as such; or that it has stopped business, or has even gone into insolvency, — are none of them facts which suffice to remove the liability. The receiver or the trustee, or whoever else may have charge of the corporate affairs for the purpose of winding them up and settling with the creditors, succeeds to all the rights of the corporation in this respect. It is not only within his power, but it is a part of his legal duty, to enforce collections of unpaid stock subscriptions, so far as may be needful to discharge the corporate indebtedness. It makes no difference that all prior calls and instalments have been duly paid. Neither does a provision for the forfeiture of stock in case of a default in the payment of an instalment have any bearing upon this rule. It cannot supersede the obligation to pay in full, but is to be construed as cumulative.<sup>2</sup> But where an increase of stock has failed for want of sufficient subscriptions the contract of a subscriber is dead and cannot be reanimated by subsequent proceedings for a smaller increase in which he does not participate.<sup>2a</sup>

And where payment was made for stock of a national bank under an erroneous belief on the part of the payer that his subscription for an increased issue of stock was binding, the payment may be recovered.<sup>2b</sup>

§ 671. **Subscribers cannot be released by Directors nor by Agreement among Themselves.** — To the doctrine of trust must be referred the further principle that a subscription for bank stock cannot be diminished after it is once made. So soon as it is legally complete it is an obligation from which even the directors cannot grant the subscriber any absolution,<sup>0</sup> either for the whole or for any part, which will avail him as against persons who were creditors of the corporation prior to the diminution. The directors do not represent these persons, and are unauthorized to discharge an indebtedness of which they are the real beneficiaries; though as toward subsequent creditors the proceeding may doubtless be perfectly valid, if not tainted in any respect with ill-faith.<sup>1</sup>

<sup>2</sup> *Sagory v. Dubois*, 3 Sandf. Ch. (N. Y.) 466; *Lewis v. Robertson*, 13 Sm. & Mar. (Miss.) 558; *Bank of St. Mary's v. St. John*, 25 Ala. N. S. 566; *Thornton v. Lane*, 11 Ga. 459.

<sup>2a</sup> *Matthews v. Columbia National Bank*, 77 Fed. 372; *Winters v. Armstrong*, 37 Fed. 508.

<sup>2b</sup> *Bacon v. Tillinghast*, 84 Fed. 71.

<sup>0</sup> § 671. Nor can the corporation do so without the consent of the creditors. *Union Savings Bank v. Leiter*, 145 Cal. 696, 79 Pac. 441 (1905).

<sup>1</sup> *Payne v. Bullard*, 23 Miss. 88; *Penobscot & Kennebec R. R. Co. v. Dunn*, 39 Me. 587; *Mann v. Pentz*, 2 Sandf. Ch. (N. Y.) 257; *Bank*

Where credit has been acquired by a bank on the faith of the capital stock supposed to have been subscribed, the stockholders cannot by resolutions passed among themselves release themselves from liability.<sup>1a</sup>

If the directors purchase stock in their own names to sustain the credit of the bank they should be liable thereon.<sup>1b</sup>

But the liability of a subscriber is discharged by a discharge in bankruptcy.<sup>2</sup>

§ 671 A. **Subscription induced by Fraud.**— If a subscription has been induced by fraud it may be rescinded,<sup>1</sup> and the purchase price recovered; and if the money or property is able to be identified or its proceeds traced into the hands of the bank a lien may be enforced thereon. But the rights of such subscribers, however, are subject to the superior rights of innocent third parties who are purchasers without notice.<sup>2</sup> But if the officers who urge the purchase of the stock have no knowledge that their representations are false, the sale is valid and may not be rescinded.<sup>3</sup>

§ 672. **The Statutes of Limitations.**— The doctrine that the stock subscriptions are in the nature of a trust fund for payment or corporate liabilities seems to be well established. From it results the principle that subscribers cannot avail themselves of the Statute of Limitations in bar of the claims of creditors to have full payment made. For the subscribers are chargeable with the trust, and though the corporation may never have seen fit to enforce it, yet the *cestuis* do not thereby lose their rights.<sup>1</sup> The

of *Des Arc v. Moody*, 110 Ark. 39, 161 S. W. 134 (1913), directors had no right to cancel notes for the stock subscriptions; *Crawford v. Roney*, 126 Ga. 763, 55 S. E. 499 (1906).

<sup>1a</sup> *Hill v. Silvey*, 81 Ga. 508, 8 S. E. 808.

<sup>1b</sup> *Jones, Assignee v. Johnson*, 86 Ky. 545, 6 S. W. 582.

<sup>2</sup> *Marr v. Bank of West Tennessee*, 4 Lea (Tenn.) 578.

<sup>1</sup> § 671 A. The subscription cannot be rescinded after the insolvency of the bank and the institution of proceedings to wind it up, even though the subscriber lives a considerable distance from the bank and it would have been inconvenient for him to ascertain its condition. *Little v. Owensboro Savings Bank*, 150 Ky. 331, 150 S. W. 334 (1912); and even though no certificates were issued to subscribers and even though they took no part in the affairs of the bank they may be held liable for the price of the stock. *Robertson v. Owensboro Savings Bank*, 150 Ky. 50, 149 S. W. 1144 (1912).

<sup>2</sup> *Burleson v. Davis*, 141 S. W. 559 (Tex. Civ. App.) (1911).

<sup>3</sup> *Sebastian County Bank v. Gann*, 121 Ark. 115, 180 S. W. 754 (1915).

<sup>1</sup> § 672. *Payne v. Bullard*, 23 Miss. 88; *King v. Elliott*, 5 Sm. & Mar. (Miss.) 447; *Arthur v. Commercial & Railroad Bank of Vicksburg*, 9 Sm. & Mar. (Miss.) 430.

collection in due season by the corporation is a matter lying wholly between itself and the subscribers. The neglect of the former cannot exonerate the latter from obligations which do not run alone to the corporate body for its sole benefit, but rather continue through it, as through a conduit pipe, for the real and ultimate benefit of creditors. The corporation cannot stand between the real debtors and the real creditors, and by its *laches* continued for six years, which under such circumstances would often be voluntary and culpable, save the former from a *bona fide* liability to the latter.

The cited case of *Payne v. Bullard*,<sup>1</sup> however, allows the possibility of one very reasonable exception to this rule in the case where the bank ceases to elect officers and to carry on business. A contemporaneous cessation of the trust may be fairly considered as taking place, from the date of which the statute may properly begin to run. Whether the corporation itself by neglecting for six years to call for any instalment would thereby forfeit its rights to demand further payments for any other purpose than that of meeting corporate debts which the corporate assets do not suffice to pay, is a question which has never been decided. There is some authority, by analogy at least, for supposing that the Statute of Limitations would have its customary operation.<sup>2</sup> But the lapse of several years creates a natural presumption that the subscriptions have been paid in,<sup>3</sup> and therefore one who held through mesne conveyances from an original subscriber, and had had no personal knowledge of the fact that full payments had not been made, might have a reasonable and a sufficient claim to protection.

In Tennessee it has been held that against the claim upon a subscriber the Statute of Limitations begins to run when the call is made.<sup>4</sup>

§ 673. **Transfer by Subscriber.** — *After shares have been issued* the owner of course has the ordinary power to sell and transfer them, equally whether the whole price or only an instalment has been paid up, unless the by-laws declare otherwise. *But before this stage* has been reached, while his position is simply that of a subscriber, his privilege of transfer exists indeed, but is subject to the restriction that it will not be valid so far as to relieve him from his liability upon the unpaid balance of his subscription,

<sup>2</sup> Georgia Manuf. & Paper Mill Co. v. Amis, 53 Ga. 228.

<sup>3</sup> Agricultural Bank v. Burr, 24 Me. 256.

<sup>4</sup> Marr v. Bank of West Tennessee, 4 Lea (Tenn.) 578.

unless it is assented to by the corporation, and his assignee is accepted, either directly or by sufficient implication, in his place. After such acceptance the assignor is fully relieved and exonerated from all liability on his subscription, and the assignee, by virtue of the same act, succeeds in every respect to all the liabilities, rights, privileges, and disabilities of his assignor, as herein above set forth.<sup>1</sup> After an issue of shares the shareholder is an owner of assignable personal property; before the issue he is only a party to a contract in which his interest can be divested only with the consent of the second contractor. Under the Tennessee bankruptcy act of 1859 an original subscriber is liable for the whole amount of his subscription, though he has assigned his stock; and it is immaterial that the bank was chartered before the passage of the act. The assignee, however, is primarily liable.<sup>2</sup>

§ 674. **What constitutes a Subscription.** — It has been held in New York that signature of the articles of association and writing a certain number of shares opposite the signer's name have the legal effect of, and are valid as, a subscription for that number of shares; and this although the document does not in terms profess to be, or to create, a contract of subscription.<sup>1</sup> The articles provided for in section 5 of the Act of 1864 are similar in their nature, and the cited cases form proper precedents for the determination of like questions arising in regard to them. That the organization certificate provided for in section 6 is, if not strictly a subscription in itself, at least such proof of subscription as would estop any signer from denying the fact, does not admit of a doubt.

#### **Liability of Shareholders beyond their Original Subscriptions.<sup>a</sup>**

§ 675. **Exists only by Contract or Statute.** — An advertisement, "Every stockholder individually responsible for all liabilities," shows a partnership.<sup>1</sup> Aside from cases in which the stockholders have themselves created an extraordinary responsi-

<sup>1</sup> § 673. *Cowles v. Cromwell*, 25 Barb. (N. Y.) 413; *Palmer v. Lawrence*, 3 Sandf. (N. Y.) 161; *Cole v. Ryan*, 52 Barb. (N. Y.) 168; see also 28 Pa. St. 339.

<sup>2</sup> *Marr v. Bank of West Tennessee*, 4 Lea (Tenn.) 578 (1880).

<sup>1</sup> § 674. *Cole v. Ryan*, 52 Barb. (N. Y.) 168; *Dayton v. Borst*, 7 Bos. (N. Y.) 115.

<sup>a</sup> See Fed. Res. Act, Sec. 2, Part II, § 90.

<sup>1</sup> § 675. *Uhl v. Harvey*, 78 Ind. 26 (1881).

bility, any liability of this description is the creature solely of legislation.<sup>10</sup> It can arise only under the charter or under the organic law of the corporate existence.<sup>10a</sup> The general liability of all combined may be restricted to the single duty of paying off and redeeming all the paper of the bank which is circulating as currency at the time of the winding up of its affairs; or it may be extended to embrace the entire corporate indebtedness of every description.

The obligation of a stockholder for the debts of a corporation arises because of the principle of estoppel, by which one is precluded from denying a relation which he has assumed and upon the strength of which others have acted.<sup>1a</sup>

This obligation cannot be modified or released by any action on the part of the corporation or the corporation and stockholders.<sup>1b</sup> It is not, however, retroactive.<sup>1bo</sup>

The liability of a shareholder in a national bank to an assessment on his shares is not a contractual liability,<sup>1ba</sup> but arises by force of the statute authorizing the assessment.<sup>1c</sup>

<sup>10</sup> The statutes are strictly construed. So the Pennsylvania act of May 11, 1874, P. L. 135, which imposes a double liability upon the stockholders of banks, does not apply to trust companies incorporated under the acts of 1874 and supplements thereto. *De Haven v. Pratt*, 223 Pa. St. 633, 72 Atl. 1068 (1909); *Lankford v. Menefee*, 45 Okla. 228, 145 Pac. 375 (1914). *Smathers v. Western Carolina Bank*, 135 N. C. 410, 47 S. E. 893 (1904).

Nor does the provision in Minnesota apply to savings banks. *State v. Savings Bank*, 87 Minn. 473, 92 N. W. 403 (1902). See *Man v. Boykin*, 79 S. C. 1, 60 S. E. 17 (1908); *Reid v. De Jarnette*, 123 Ga. 787, 51 S. E. 770 (1905); *Wedemeyer v. Hindelang*, 161 Mich. 600, 126 N. W. 708 (1910); *Buist v. Williams*, 81 S. C. 495, 62 S. E. 859 (1908).

<sup>10a</sup> As the liability is in derogation of the common law the statute cannot be extended beyond the words used. *Brunswick Terminal Co. v. National Bank*, 192 U. S. 386, 48 L. ed. 491, 24 Sup. Ct. 314 (1904).

<sup>1a</sup> *Stufflebeam v. De Lashmut*, 83 Fed. 449.

<sup>1b</sup> *Scott v. Latimer*, 89 Fed. 843; *Northwestern Trust Co. v. Bradbury*, 117 Minn. 83, 134 N. W. 513, 1913D Ann. Cas. 69, n. (1912). See *Elson v. Wright*, 134 Iowa 634, 112 N. W. 105 (1907). But the doubtful and uncertain liability may be compromised and compounded by the receiver, upon the approval of the court. *State v. German Savings Bank*, 65 Neb. 416, 91 N. W. 414 (1902); *Smathers v. Western Carolina Bank*, 135 N. C. 410, 47 S. E. 893 (1904).

<sup>1bo</sup> *Black v. Special School Dist. No. 2*, 116 Ark. 472, 173 S. W. 846 (1915). See *Man v. Boykin*, 79 S. C. 1, 60 S. E. 17, 128 Am. St. Rep. 830 (1908).

<sup>1ba</sup> The liability of a stockholder in a state bank is a liability voluntarily assumed by the act of becoming a stockholder, and an obligation thus assumed is purely contractual, contains all the elements of a contract and is to be enforced as such. *Adams v. Clark*, 36 Colo. 65, 85 Pac. 642

The constitutional liability of stockholders in a banking corporation was designed solely for the benefit of creditors, and constitutes a fund available only when the bank is insolvent and unable to meet its obligations in full. It amounts for all practical purposes to a reserve or trust fund to be resorted to only in proceedings in liquidation. It exists in favor of the creditors collectively, not severally, and in proportion to the amount of their respective claims against the corporation.<sup>1d</sup>

### *Measure of Liability*

(a) The extent of the possible liability of each individual may be unlimited, save by the amount of his proportion of the aggregate indebtedness of all; <sup>1e</sup> for it may be specially restricted by the proviso that it shall not exceed a certain absolute amount; as, for example, the amount of the par value of all the shares held by him. This last proviso is of frequent occurrence in banking statutes. It is often loosely expressed; but it seems that the obvious intention of the legislators will be allowed to correct the

(1906). See also *Meyers v. Knickerbocker Trust Co.*, 139 Fed. 111 (1905); *Miller v. Connor*, 177 Mo. App. 630, 160 S. W. 582 (1913).

The liability of the stockholder, though statutory in its origin, is contractual in its nature. *Whitman v. Oxford National Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. 477 (1900); *Platt v. Wilmot*, 193 U. S. 602, 48 L. ed. 809, 24 Sup. Ct. 542 (1904); *McClain v. Rankin*, 197 U. S. 154, 49 L. ed. 702, 25 Sup. Ct. 410 (1904); *Christopher v. Norvell*, 201 U. S. 216, 50 L. ed. 732, 26 Sup. Ct. 502 (1906).

<sup>1e</sup> *First National Bank v. Hawkins*, 79 Fed. 51; *Rankin v. Miller*, 207 Fed. 602 (1913); *Studebaker v. Perry*, 184 U. S. 258, 46 L. ed. 528, 22 Sup. Ct. 463 (1902); *McDonald v. Thompson*, 184 U. S. 71, 46 L. ed. 437, 22 Sup. Ct. 297 (1902); *Aldrich v. Bingham*, 131 Fed. 363 (1904); *Bernheimer v. Converse*, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. 755 (1907); *Smathers v. Western Carolina Bank*, 155 N. C. 283, 71 S. E. 345, 1912C Ann. Cas. 398, n.

<sup>1d</sup> *Northwestern Trust Co. v. Bradbury*, 117 Minn. 83, 134 N. W. 513, 1913D Ann. Cas. 69, n.; *Holcomb v. Tierney*, 79 Neb. 660, 113 N. W. 204 (1907); *Hamilton National Bank v. American Loan Co.*, 66 Neb. 67, 92 N. W. 189 (1902); *Miller v. Connor*, 177 Mo. App. 630, 160 S. W. 582 (1913); *Smathers v. Western Carolina Bank*, 135 N. C. 410, 47 S. E. 893 (1904); *Conway v. Owensboro Savings Bank*, 165 Fed. 822 (1908); *id.* 185 Fed. 950 (1911); *Alsop v. Conway*, 188 Fed. 568 (1911). In Michigan the statutory liability of the stockholder is for the benefit of "depositors" and is not that of a surety. *Wedemeyer v. Hindelang*, 161 Mich. 600, 126 N. W. 708.

<sup>1e</sup> *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626 (1906); *Richardson v. Boot*, 18 Colo. App. 140, 70 Pac. 454 (1902). Interest may be allowed to holders of certificates of deposit. *Lamar v. Taylor*, 141 Ga. 228, 80 S. E. 1085 (1914).



inaccuracy of their phraseology. Thus where, by the language of the act, the measure of a stockholder's liability was stated to be "the amount of his stock," a literal interpretation would have permitted only a forfeiture of his shares. But since this must take place at any rate, and the law thus construed would be foolish and superfluous, it was held that the words should be treated as if they had read, as it was doubtless intended that they should read, "a sum equal to the amount of his stock."<sup>2</sup> In South Carolina the measure of the statutory liability is a sum equal to 105 % of the amount of the shareholder's stock.<sup>2a</sup>

The amount of his stock will be determined by estimating his shares at their par value, without regard to the market price.<sup>3</sup> A provision that the liability shall attach only when the debts exceed twice the amount of the capital stock, has been construed to signify not the nominal capital stock, but only the amount which has been actually paid in. If the debts are more than double this amount, then the stockholders will be held.<sup>4</sup>

(b) In Massachusetts the stockholders are liable for the redemption of the circulating notes, and any one who transfers his stock to avoid this liability, or who, having reason to believe the bank insolvent, transfers his stock within six months before surrender or forfeiture actually takes place, will be held; and if a loss or deficiency in the capital stock occurs by official mismanagement, the then stockholders must pay it, but the liability shall not extend beyond an amount equal to their stock. Any stockholder may compel contribution by a bill in equity.<sup>5</sup>

(c) In Minnesota, if the bank becomes insolvent within a year after transfer of stock the stockholder is liable to double the amount of his stock.<sup>6</sup>

<sup>2</sup> *In re Empire City Bank*, 18 N. Y. 199; *Buenz v. Cook*, 15 Colo. 38, 24 Pac. 679.

<sup>2a</sup> *Parker v. Carolina Savings Bank*, 53 S. C. 583, 31 S. E. 673; *Buist v. Williams*, 81 S. C. 495, 62 S. E. 859 (1908); *Wilkes v. Arthur*, 91 S. C. 163, 74 S. E. 361 (1912).

<sup>3</sup> *Thornton v. Lane*, 11 Ga. 459; *Lane v. Morris*, 10 *id.* 162.

<sup>4</sup> *Minor v. Mechanics' Bank of Alexandria*, 1 Pet. 46, 7 L. ed. 47.

<sup>5</sup> R. L. c. 115, §§ 80-87.

<sup>6</sup> *Harper v. Carroll*, 62 Minn. 152, 69 N. W. 610; *Hunt v. Seager*, 91 Minn. 264, 98 N. W. 91 (1904). The double liability does not apply to stock in a savings bank when the statute under which it was incorporated contained no provision for capital stock but which, by special laws, was changed to a bank with capital stock. *State v. Savings Bank*, 87 Minn. 473, 92 N. W. 403 (1902).

If the creditors consent to a void order of reorganization and accept its

In Arkansas, by Kirby's Digest § 1990, the bank and stockholders are primarily liable for the public funds deposited in an incorporated bank. But the liability does not arise until the bank fails to make payment on demand, and it is only against those who are stockholders at the time.<sup>7</sup>

In Colorado the liability of the stockholder ceases at the expiration of one year after the date of sale and transfer of stock.<sup>8</sup>

In Maryland the shareholders of a trust company are liable to creditors for double the amount of their stock.<sup>9</sup>

In Minnesota and South Dakota the liability is limited to an amount equal to the par value of the stock held by each stockholder.<sup>10</sup>

§ 676. **Statute subsequent to Organization.** — After a bank has been organized, either under a charter or under a general banking law, the legislature will have no power to create by subsequent enactment any personal liability on the part of the stockholders in excess of the loss of the money paid in by them for their shares.

A statute giving the creditors of a bank a new remedy against stockholders cannot affect those who took stock before its passage.<sup>1</sup> The effort in fact aims at impairing the obligation of a contract, and as such would of course be fruitless. But if the charter or the organic law contains a clause declaring them subject to future alteration or amendment, then the obstacle to the subsequent creation of personal liability is removed. In that case a general law, passed for the purpose of affecting banking corporations generally, will affect all such as have been organized under a charter or a law containing this reservation. Neither will it make any difference that the articles of association distinctly assert that there shall be no personal liability; for these are valid only as they

benefits they are estopped to deny that the stockholders are not liable for the amount they have paid under the order. *Hunt v. Rosen*, 87 Minn. 68, 9 N. W. 259 (1902).

<sup>7</sup> *Warren v. Nix*, 97 Ark. 374, 135 S. W. 896 (1911). See *Roberts v. State*, 116 Ark. 410, 172 S. W. 1039 (1915).

<sup>8</sup> *Richardson v. Boot*, 18 Colo. App. 140, 70 Pac. 454 (1902).

<sup>9</sup> *Maryland Trust Co. v. National Mechanics' Bank*, 102 Md. 608, 63 Atl. 70 (1906).

<sup>10</sup> *Northwestern Trust Co. v. Bradbury*, 117 Minn. 83, 134 N. W. 513, 1913D Ann. Cas. 69, n.; *id.*, 112 Minn. 76, 127 N. W. 386 (1910); *Union National Bank v. Halley*, 19 S. D. 474, 104 N. W. 213 (1905).

<sup>1</sup> § 676. *Grand Rapids Savings Bank's Appeal*, 52 Mich. 557, 18 N. W. 356 (1884).

are in perfect subjection to, and accord with, all the results, direct and indirect, arising out of the law of the corporate existence.<sup>2</sup>

§ 677. **New Remedy to enforce an Existing Liability.** — Where laws in existence at the time of the incorporation of a bank establish a liability on the part of the shareholders to contribute ratably towards payment of its circulation in case of insolvency, there is nothing unconstitutional in the passage of subsequent laws establishing a new and more efficient means of enforcing this liability. Thus where, at the time of the insolvency, the only remedy against the shareholders was by proceedings in equity on the part of the bill-holders, and subsequently, pending the liquidation of the affairs of the bank, a new statute was passed creating the machinery of the bank commissioners, and providing a simple and expeditious means whereby they could enforce collections from shareholders, (the amount of actual liability not of course being varied,) it was held that the shareholders in the already insolvent bank could not object to the application of this new statute to their own case. It bore upon the remedy only, not upon the liability. Neither did a clause subjecting shareholders who were delinquent in meeting the assessment to pay interest at the rate of twelve per cent per annum increase their liability. For the liability was still only to pay the proportionate amount allotted to the delinquent, by which payment he could be discharged; it was strictly for his own default in non-performance of this obligation that the penalty was imposed.<sup>1</sup> But *Baker v. Atlas Bank*<sup>2</sup> appears to curtail the liability of shareholders in a very extraordinary manner. The statute provided that if any deficiency in the capital stock should arise from the official mismanagement of directors, the shareholders at the time of such mismanagement should be liable individually to restore the deficiency. The next section made the shareholders liable, in case of insolvency of the bank, to redeem the circulation. The court appear to hold that the liability of the shareholders, in case of mismanagement, was only a liability to the bank itself, and lasted only so long as the bank continued in operation; and that, if the bank should go into liquidation by proceedings in insolvency, this liability was at once and thereby brought to an end, creditors

<sup>2</sup> *In re Empire City Bank*, 18 N. Y. 199; *In re Oliver Lee & Co.'s Bank*, 21 *id.*, 19.

<sup>1</sup> § 677. *Commonwealth v. Cochituate Bank*, 3 Allen (Mass.) 42.

<sup>2</sup> 9 Met. (Mass.) 182.

could not enforce it either at law or in equity, and the sole liability of the shareholders would thereafter be confined to the redemption of the circulation.

A statute which imposes an individual liability upon the stockholders for the debts of every banking corporation applies to a moneyed corporation created before the statute goes into effect.<sup>3</sup>

Such a statute, although retroactive, relates to the remedy, and is therefore constitutional, and applies to a bank which has been dissolved and a receiver appointed prior to the enactment of such statute.<sup>4</sup>

**§ 678. The Statute of Limitations upon Statutory Liability.**—The liability of shareholders to contribution for discharging the indebtedness of an insolvent bank is barred by the Statute of Limitations, and this equally whether the proceedings to enforce such liability are at law or in equity.<sup>1</sup> The time when the statute begins to run is a question not always easy of solution. In *Baker v. Atlas Bank*,<sup>1</sup> which was a suit brought against shareholders to compel them to make up a deficiency in the capital stock of the bank caused by the mismanagement of the directors, it was held that the statute protected the defendants, inasmuch as the suit had not been instituted until more than six years had elapsed since the loss occurred. In *Commonwealth v. Cochituate Bank*,<sup>1</sup> proceedings were not begun until after the lapse of six years next following the issue of a perpetual injunction against the bank, on the ground of its insolvency; and here also the shareholders were declared to be protected by the statute.

The statute begins to run when a deficiency has been ascertained and an assessment made.<sup>1a</sup> It does not begin to run until the assets of the debtor corporation are fully exhausted, nor until it has been judicially ascertained in proceedings against the corporation that a resort to the statutory liability of the shareholders is necessary.<sup>1b</sup> The Statute of Limitations will begin to run only from the time

<sup>3</sup> *Hushfield v. Bopp*, 27 App. Div. (Hun, N. Y.) 180.

<sup>4</sup> *Persons v. Gardner*, 47 App. Div. (Hun, N. Y.) 490.

<sup>1</sup> § 678. *Baker v. Atlas Bank*, 9 Met. (Mass.) 182; *Commonwealth v. Cochituate Bank*, 3 Allen (Mass.) 42.

<sup>1a</sup> *McDonald v. Thompson*, 184 U. S. 71, 46 L. ed. 437, 22 Sup. Ct. 297 (1902); *McClain v. Rankin*, 197, U. S. 154, 49 L. ed. 702, 25 Sup. Ct. 410 (1905); *Rankin v. Barton*, 199 U. S. 228, 50 L. ed. 163, 26 Sup. Ct. 29 (1905). See *King v. Pomeroy*, 121 Fed. 287 (1903).

<sup>1b</sup> *Flynn v. American Banking etc. Co.*, 104 Me. 141, 69 Atl. 771, 129 Am. St. Rep. 378, 19 L. R. A. (N. S.) 428, n. (1908); *Miller v. Connor*, 177 Mo. App. 630, 160 S. W. 582 (1913).

the cause of action is fully matured through the making of an assessment and the arrival of the day when it becomes payable.<sup>1c</sup> In Minnesota it commences to run at the appointment of a receiver.<sup>1d</sup> But where stockholders have paid the money into court within six years of the appointment of the receiver the statute does not run against its distribution until six years after such payment,<sup>1e</sup> and if insolvency occurs within one year after transfer of stock the cause of action against such transfer may be enforced at any time within six years from the time of insolvency.<sup>1f</sup>

In Kansas essential steps preliminary to the bringing of an action must be made within a reasonable time and if not then taken the statute will begin to run.<sup>1g</sup>

In Georgia the statute will not begin to run against the bank until a suit against it is filed, and it might not begin to run until the actual insolvency of the bank.<sup>1h</sup> In Washington it begins to run on the insolvency of the bank.<sup>1i</sup>

The Statute of Limitations does not begin to run against the devisee of a stockholder against whom an action had been brought in his lifetime and was pending when he died, until the question of his liability has been adjudicated and determined.<sup>1j</sup>

In California the statute begins to run from the date of deposit.<sup>1</sup>

Where a stockholder in an insolvent bank was outside the state and could not be served in an action to recover on his stockholder's liability, the fact that he was not served until seven years after the other stockholders were served does not show laches preventing the maintenance of the action.<sup>k</sup>

In South Carolina and Minnesota the stockholders are protected after six years by the statute.<sup>2</sup> In California and Kansas action

<sup>1c</sup> *Rankin v. Miller*, 207 Fed. 602 (1913).

<sup>1d</sup> *Willius v. Albrecht*, 100 Minn. 436, 111 N. W. 387 (1907).

<sup>1e</sup> *State v. Germania Bank*, 106 Minn. 446, 119 N. W. 61 (1909).

<sup>1f</sup> *Northwestern Trust Co. v. Bradbury*, 112 Minn. 76, 127 N. W. 386 (1910).

<sup>1g</sup> *Rankin v. Barton*, 69 Kan. 629, 77 Pac. 531 (1904). Reversed in 199 U. S. 228, 50 L. ed. 163, 26 Sup. Ct. 29 (1905), holding that liability dates from order of the comptroller.

<sup>1h</sup> *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626 (1906).

<sup>1i</sup> *Bennett v. Thorne*, 36 Wash. 253, 78 Pac. 936, 68 L. R. A. 113 (1904).

<sup>1j</sup> *Richards v. Gill*, 138 App. Div. 75 (1910), 122 N. Y. S. 620.

<sup>1</sup> *Gardiner v. Royer*, 167 Cal. 238, 139 Pac. 75 (1914).

<sup>k</sup> *Kingsley v. Clark*, 57 Colo. 352, 141 Pac. 464 (1914).

<sup>2</sup> *Parker v. Carolina Savings Bank*, 58 N. C. 583, 31 S. E. 673; *Willius v. Albrecht*, 100 Minn. 436, 111 N. W. 862 (1907).

is barred in three years;<sup>3</sup> in Washington<sup>3a</sup> it is barred in two years; in Nebraska,<sup>3b</sup> in four years, and in Georgia,<sup>3c</sup> in twenty years.

The right of action against a stockholder of an insolvent national bank does not accrue until assessment is made by the comptroller, and until there has been a demand of payment and refusal to pay.<sup>4</sup> The national banking act fixes no definite time within which the comptroller must act.<sup>4</sup>

An action to enforce the individual liability of a stockholder in a national bank is governed by the Statute of Limitations of the state in which it is brought.<sup>5</sup>

§ 679. **Who is Liable as a Shareholder.** — As a general rule any person whose name is registered on the stock-ledger of the corporation as a shareholder will be held liable as such.<sup>6</sup> The

<sup>3</sup> *Wells v. Black*, 117 Cal. 157, 48 Pac. 1090; *Gardiner v. Royer*, 167 Cal. 238, 139 Pac. 75 (1914); *Miller v. Lane*, 160 Cal. 90, 116 Pac. 58 (1911); *Jones v. Goldtree*, 142 Cal. 383, 77 Pac. 939 (1904). *Rankin v. Barton*, 69 Kan. 629, 77 Pac. 531 (1904).

<sup>3a</sup> *McClain v. Rankin*, 197 U. S. 154, 49 L. ed. 702, 25 Sup. Ct. 410 (1905). But see *Bennett v. Thorne*, 36 Wash. 253, 78 Pac. 936, 68 L. R. A. 113 (1904).

<sup>3b</sup> *McDonald v. Thompson*, 184 U. S. 71, 46 L. ed. 437, 22 Sup. Ct. 297 (1902).

<sup>3c</sup> *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626 (1906).

<sup>4</sup> *Aldrich v. Yates*, 95 Fed. 78.

<sup>5</sup> *Rankin v. Barton*, 69 Kan. 629, 77 Pac. 531 (1904). See also *McClain v. Rankin*, 197 U. S. 154, 49 L. ed. 702, 25 Sup. Ct. 410 (1905); *Rankin v. Miller*, 207 Fed. 602 (1913); *McDonald v. Thompson*, 184 U. S. 71, 46 L. ed. 437, 22 Sup. Ct. 297 (1902).

<sup>6</sup> § 679. The real owner of shares may be held liable even though the shares are not registered in his name. *Ohio Valley National Bank v. Hulitt*, 204 U. S. 162, 51 L. ed. 423, 27 Sup. Ct. 179 (1906); *Hulitt v. Ohio Valley National Bank*, 137 Fed. 461 (1905); *Williamson v. American Bank*, 185 Fed. 66 (1911). See *People v. Lasalle St. Trust etc. Bank*, 269 Ill. 518, 110 N. E. 38 (1915); *Porter v. Marine Savings Bank*, 153 N. W. 19 (Mich.) (1915); *People v. Lasalle St. Trust etc. Bank*, 269 Ill. 518, 110 N. E. 38 (1915). And in Maine it is immaterial whether a stockholder became such before or after the contraction of the debt. *Flynn v. American Banking etc. Co.*, 104 Me. 141, 69 Atl. 771, 129 Am. St. Rep. 378, 19 L. R. A. (N. S.) 428, n. (1908). The presumption is rebuttable, *Porter v. Marine Savings Bank*, *supra*.

In Georgia those stockholders who are declared by the charter of the bank to be individually liable for the debts of the bank are so liable, and no others. And such stockholders are those who were stockholders at the time a creditor sued the bank. *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626 (1906).

The equitable owner of shares standing upon the books in the name of another may be charged. *Toll v. Cobbe*, 22 Colo. App. 244, 124 Pac. 357 (1912).

records in this book are *prima facie* evidence of ownership.<sup>1</sup> A corporation holding national bank stock is estopped to resist assessment on the plea of *ultra vires*.<sup>1a</sup> If persons have suffered their names to be entered as stockholders, though by virtue of some arrangement with the bank by which it is agreed that they shall only assume this appearance without making any payments or becoming stockholders in fact, still they will be held to all the liabilities of ordinary and regular owners for the benefit of creditors.<sup>2</sup> Even where directors, for the purpose of sustaining the credit of the bank, and without any ulterior motive beyond the corporate welfare, allow shares to be placed in their names simply as a cover, and because they believed that the same could not be properly purchased or owned by the bank, they will be treated as owners so far as liability is concerned. When shares have been hypothecated and placed in the transferee's name on the books, it has been said that probably both the transferrer and the transferee could be held to contribute; but that certainly the transferee could, simply because the property appears in his

<sup>1</sup> Thornton v. Lane, 11 Ga. 459; Lewis v. Switz, 74 Fed. 381; Earle v. Carson, 188 U. S. 42, 47 L. ed. 373, 23 Sup. Ct. 254 (1902); Flynn v. American Banking etc. Co., 104 Me. 141, 69 Atl. 771, 129 Am. St. Rep. 378, 19 L. R. A. (N. S.) 428, n. (1908); Alsop v. Conway, 188 Fed. 568 (1911); Apsey v. Whittemore, 199 Mass. 65, 85 N. E. 91 (1908); Wheeler v. Werner, 140 App. Div. 695 (1910), 125 N. Y. S. 637, the owner in fact is also liable; Adams v. Clark, 36 Colo. 65, 85 Pac. 642 (1906); Abbott v. Jack, 136 Cal. 510, 69 Pac. 257 (1902); Christopher v. Norvell, 201 U. S. 216, 50 L. ed. 732, 26 Sup. Ct. 502 (1901); Abilene State Bank v. Strachan, 89 Kan. 577, 132 Pac. 200, 46 L. R. A. (N. S.) 668, n. (1913); Faulkner v. Bank of Topeka, 77 Kan. 385, 94 Pac. 153 (1908); Rankin v. Fidelity Trust Co., 189 U. S. 242, 47 L. ed. 792, 23 Sup. Ct. 553 (1902), pledgee; Hurlbert v. Arthur, 140 Cal. 103, 73 Pac. 734, 98 Am. St. Rep. 17 (1903); Kenyon v. Fowler, 155 Fed. 107 (1907), affirmed 215 U. S. 593, 54 L. ed. 341, 30 Sup. Ct. 409, holding stock for an undisclosed principal.

<sup>1a</sup> First National Bank v. Hawkins, 79 Fed. 51.

A national bank which with its surplus fund has purchased stock in another national bank cannot be assessed thereon as a stockholder even though it has received dividends on such stock. Shaw v. National German American Bank, 132 Fed. 658 (1904); nor can a trust company which has purchased stock in a bank for the purpose of controlling the same, since the purchase is void. State v. Bankers' Trust Co., 157 Mo. App. 557, 138 S. W. 669 (1911); nor is a corporation liable which has purchased bank stock in violation of statute. White v. Commercial etc. Bank, 66 S. C. 491, 45 S. E. 94 (1903). But a savings bank having become owner of stock in another bank is liable thereon. Hill v. Shilling, 69 Neb. 152, 95 N. W. 24 (1903).

<sup>2</sup> In re Reciprocity Bank, 22 N. Y. 9; O'Connor v. Witherby, 111 Cal. 524, 42 Pac. 227.

name.<sup>3</sup> But where shares have been placed in the name of a person without his consent, express or implied, and without consideration passing from him, he will be liable as a stockholder only in cases where it is shown affirmatively that he has acted fraudulently in the matter, or with the purpose of injuring the creditors of the bank.<sup>4</sup> A former holder of shares, if he makes proper effort to secure the transfer, is not liable, after insolvency of the bank, where the cashier or president failed to make the transfers on the books.<sup>5</sup>

<sup>3</sup> *In re Empire City Bank*, 18 N. Y. 199; *Boyd v. Redd*, 120 N. C. 335, 27 S. E. 35.

Under revised statutes the transferrer of stock is liable until he has the transfer put upon the books of the company. But as the purpose of the statute is to secure creditors, it is held that until the transfer is properly registered they may look to the transferrer, or at their election to the transferee. *Robinson-Pettit Co. v. Sapp*, 160 Ky. 445, 169 S. W. 869 (1914).

<sup>4</sup> *Robinson v. Lane*, 19 Ga. 337; *Morgan v. Brower*, 77 Ga. 634.

<sup>5</sup> *Hayes v. Shoemaker*, 39 Fed. 319; *Whitney v. Butler*, 118 U. S. 655, 30 L. ed. 266, 7 Sup. Ct. 47; *Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. 788; *Cox v. Elmendorf*, 97 Tenn. 526, 37 S. W. 387; *Earle v. Coyle*, 95 Fed. 99; *Hunt v. Seeger*, 91 Minn. 264, 98 N. W. 91 (1904); *Apsey v. Whittemore*, 199 Mass. 65, 85 N. E. 91 (1908); *Bracken v. Nicol*, 124 Ky. 628, 98 S. W. 920, 11 L. R. A. (N. s.) 818, n. (1907); *Weakley v. McClarty*, 136 Ky. 837, 125 S. W. 265, 136 Am. St. Rep. 279 (1909); *Apsey v. Kimball*, 221 U. S. 514, 55 L. ed. 834, 31 Sup. Ct. 695 (1911); *Kimball v. Apsey*, 164 Fed. 830 (1908); *Earle v. Carson*, 188 U. S. 42, 47 L. ed. 373, 23 Sup. Ct. 254 (1902), and it is not material that the bank and the vendee were insolvent at the time of the sale if the vendor was not aware of such fact; *Brunswick Terminal Co. v. National Bank*, 192 U. S. 386, 48 L. ed. 491, 24 Sup. Ct. 413 (1904); *Warren v. Nix*, 97 Ark. 374, 135 S. W. 896 (1911); *Whealtes v. Glover*, 125 Ga. 710, 54 S. E. 626 (1906), the transferrer is relieved unless the bank fails within six months from the time of transfer.

In South Carolina and some other states statutes require the transfer to be on the books of the company, and a stockholder is not relieved until a transfer is so made. *Man v. Boykin*, 79 S. C. 1, 60 S. E. 17, 128 Am. St. Rep. 830 (1907); *White v. Commercial etc. Bank*, 66 S. C. 491, 45 S. E. 94, 97 Am. St. Rep. 803 (1903). See *Abilene State Bank v. Strachan*, 89 Kan. 577, 132 Pac. 200, 46 L. R. A. (N. s.) 668, n. (1914); *Robinson-Pettit Co. v. Sapp*, 160 Ky. 445, 169 S. W. 869 (1914).

A former holder of stock is not relieved from liability when he sells to a director or a cashier who promises to make the transfer but does not do so. *Schofield v. Twining*, 127 Fed. 486 (1904); *White v. Commercial etc. Bank*, *supra*.

If one does not make proper effort to secure the transfer one is not relieved from liability. *McDonald v. Dewey*, 134 Fed. 528 (1905). See also *Rankin v. Fidelity etc. Ins. Co.*, 189 U. S. 242, 47 L. ed. 892, 23 Sup. Ct. 553 (1903).

One who sells stock in good faith is not liable unless the bank was insolvent at the time of the sale and the vendor knew of such insolvency



A trustee, provided he is guilty of neither fraud nor negligence, is not personally liable for assessments against stock owned by his *cestui que trust* in an insolvent national bank, and which is standing in his name as "trustee."<sup>6</sup>

While a transfer on the books of the bank without the knowledge or assent of the transferee does not make him liable as a stockholder, yet if he afterward acquiesces in or ratifies the transfer, as by joining in an application to convert the bank into a national bank, or by receiving dividends on the stock, he becomes liable.<sup>7</sup>

One who buys stock in a national bank in the name of a minor child becomes liable himself to assessment as a shareholder.<sup>8</sup>

One who buys stock in a bank in the name of one's wife without her authority, knowledge or consent and who repudiates the purchase after learning thereof is himself liable to assessment as a shareholder.<sup>8a</sup>

Where shares of an insolvent national bank stand in the name of an agent, the receiver may recover assessments from the principal, and it is immaterial that the receiver may proceed against the stockholder of record.<sup>9</sup>

Persons who have received the benefit of an increase in national bank stock and have held themselves as stockholders cannot deny liability for an assessment on the ground that the increase was fraudulent.<sup>10</sup>

or had reason to believe it insolvent. *Vandagriff v. Rich Hill Bank*, 163 Fed. 823 (1908); *Fowler v. Crouse*, 175 Fed. 646 (1910).

In Wisconsin a transferrer is liable to creditors existing at the time of the transfer if action is brought within six months after such transfer. *Gager v. Paul*, 111 Wis. 638, 87 N. W. 875 (1901).

<sup>6</sup> *Lucas v. Coe*, 86 Fed. 972; *Yardley v. Wilgus*, 56 Fed. 965. See also *Home Savings Bank v. Case*, 18 Ont. App. 489; *Smathers v. Western Central Bank*, 155 N. C. 283, 71 S. E. 345, 1912C Ann. Cas. 398, n. But see *Flynn v. American Banking etc. Co.*, 104 Me. 141, 69 Atl. 771, 129 Am. St. Rep. 378, 19 L. R. A. (N. S.) 428, n. (1908).

<sup>7</sup> *Keyser v. Hitz*, 133 U. S. 138, 33 L. ed. 531, 10 Sup. Ct. 290; *Rand v. Columbia National Bank*, 87 Fed. 520; *Bissell v. Heath*, 98 Mich. 472, 57 N. W. 585; *Kenyon v. Fowler*, 155 Fed. 107 (1907); *Christopher v. Norvell*, 201 U. S. 216, 50 L. ed. 732, 26 Sup. Ct. 502 (1906); *Abbott v. Jack*, 136 Cal. 510, 69 Pac. 257.

When a beneficiary receives notice that trustees have improperly invested in stocks for her she has the right to accept or reject it. If she accepts or has lost the right by laches or acquiescence to reject it she is liable. *Williams v. Cobb*, 219 Fed. 663 (1914).

<sup>8</sup> *Foster v. Chase*, 75 Fed. 797; *Aldrich v. Bingham*, 131 Fed. 363 (1904). See *Clark v. Ogilvie*, 111 Ky. 181, 63 S. W. 429 (1901).

<sup>8a</sup> *Hunt v. Reardon*, 93 Minn. 375, 101 N. W. 606 (1904).

<sup>9</sup> *Hubbell v. Houghton*, 86 Fed. 547. <sup>10</sup> *Latimer v. Bond*, 76 Fed. 536.

A married woman is liable for assessments on stock held by her.<sup>10a</sup>

After a bank has been declared insolvent and a receiver appointed, a shareholder who has been, prior to such insolvency, induced to purchase stock by fraudulent representations must show, in order to escape individual statutory liability for the debts of the bank — (1) the fact of fraud, (2) due diligence in seeking relief from the vicious contract, (3) acts of diligence negating any laches, and (4) that no debt was created or credits given by the bank after he became such stockholder.<sup>11</sup>

One who, at the organization of the bank, paid \$200 and received a certificate stating that on payment of the "balance due" he would be entitled to twenty shares of \$100 each, is a stockholder, and liable to creditors of the bank, although he may have regarded the transaction as an option to take the shares or forfeit the money paid.<sup>12</sup>

In Georgia, if the charter was granted prior to the act of 1893 (Acts 1893, p. 70: Civ. Code 1895, §§ 1903-1911) liability attaches only upon stockholders who became such by subscribing to the capital stock, and not upon shareholders who by way of succession from the original stockholders became owners of stock.<sup>13</sup>

§ 680. One (P.) to whom stock is transferred on the books of a national bank as a pledge for a debt of the real owner becomes as to the bank and its creditors the owner of the stock. He is entitled to vote at stockholders' meetings, to draw dividends, and to transfer the stock on the books. The public is notified by the list of stockholders that he is the owner of so many shares, and he is liable to creditors even though the loan has been paid and the stock certificate given back to the original owner, with a power of attorney to have the stock transferred to himself, but this has not been done. So long as P.'s name appears on the books of the bank as owner, unless by default of the bank itself, he is liable to the bank and its creditors as a shareholder.<sup>1</sup>

<sup>10a</sup> *Christopher v. Norvell*, 134 Fed. 842 (1905); *Smathers v. Western Carolina Bank*, 155 N. C. 283, 71 S. E. 345, 1912C Ann. Cas. 398, n.

<sup>11</sup> *Wallace v. Hood*, 89 Fed. 11; *Wallace v. Bacon*, 86 Fed. 553; *Stufflebeam v. De Lashmutt*, 83 Fed. 449; *Scott v. Latimer*, 89 Fed. 843; *Bissell v. Heath*, 98 Mich. 472, 57 N. W. 585.

<sup>12</sup> *Ross v. Bank*, 20 Nev. 191, 19 Pac. 243.

<sup>13</sup> *Reid v. De Jarnette*, 123 Ga. 787, 51 S. E. 770 (1905).

<sup>1</sup> § 680. *Moore v. Jones*, 3 Woods 53; *Bowdell v. Farmers & Merchants' National Bank of Baltimore*, 14 Bankers' Mag. (N. Y.) 3d series, 387; *Chatham Bank v. Brobston*, 99 Ga. 801, 27 S. E. 790; *State of Min-*

While the above seems to be the general rule, some later cases are in conflict.

*Pauly v. State Loan and Trust Co.*<sup>2</sup> holds that where a corporation is named on the books of a national bank as "pledgee," it is not liable to assessment as a stockholder if the bank becomes insolvent.

*Baker v. Old National Bank*<sup>3</sup> holds that where certain shares are registered in a bank as follows: "F. A. Cranston, Cashier Old National Bank, Providence, R. I.," neither Cranston nor the bank were estopped from showing that the stock was held as a pledge, and neither were liable as shareholders for assessments.

And in *Welles v. Larrabee*<sup>4</sup> it is held that under § 5151 of the Revised Statutes of the United States a pledgee of bank stock is not liable to assessment.

A mere pledgee who receives from his debtor a transfer of shares, surrenders the certificates to the bank, takes out new ones in his own name, in which he is described as "pledgee", and holds them afterwards in good faith and as collateral security for the payment of his debt, is not subject to personal liability as a shareholder.<sup>5</sup>

*A Transfer of National Bank Stock on the Books appeared, "L. to D."; There were Intermediate Parties, K. and A.; D. was Irresponsible. The Receiver recovered from L., but L. failed in a Suit against K.*

§ 681. After failure of a national bank's London correspondent, L. sold K. certain stock, at \$50 per share, and made the transfer on the bank books, leaving the name of the transferee blank. The bank failed, and then K. sold to A. for \$11 per share, and filled in, not A.'s name, but that of D., who was A.'s irresponsible negro porter. So that the books stood, "L. to D. (irresp.)." The receiver disregarded the transfer, sued L., and recovered \$3579, the contribution due for the said shares. The court holding that

*nesota v. Bank of New England*, 70 Minn. 398, 73 N. W. 153 (1897); *Harper v. Carroll*, 62 Minn. 152, 69 N. W. 610.

But he is not liable after a retransfer of the stock to one who became indebted to the bank without knowledge that he had been a stockholder, even though he did not publish a notice of the retransfer. *Brunswick Terminal Co. v. National Bank*, 112 Fed. 812 (1901).

<sup>2</sup> 56 Fed. 430.

<sup>3</sup> 86 Fed. 1006.

<sup>4</sup> 36 Fed. 866. See also *National Park Bank v. Harmon*, 79 Fed. 891.

<sup>5</sup> *Rankin v. Fidelity Trust Co.*, 189 U. S. 242, 47 L. ed. 792, 23 Sup. Ct. 553 (1902).

under the national banking laws (R. S. § 5151, see Thompson on Shareholders, § 215), no transfer could be made except on the books of the bank; that no incomplete transfer could be recognized; and that a transfer to an irresponsible person could not release the person previously liable on the books. So that L. stood liable on the books. Afterward L. sued K. to recover the amount that he had had to pay; but the court held that L. could not recover; K.'s sale to A. was valid, and protected K. from liability. There was a strong dissent, however, on the ground that, where statute requires a transfer to be made on the books, there is an implied agreement that the vendee will indemnify the seller for all calls the seller is called on to pay so long as the transfer is not registered. It is the transferee's duty to put his name on the books to protect the vendor, and if he wrongfully omits this, he should be held responsible for loss resulting.<sup>1</sup> It is clear that the one who really should stand the loss in this case is A. As to the bank and the receiver, of course they cannot be expected to look beyond the bank books; but as between the other parties, K. should bear the loss rather than L., and A. rather than K.; each sale carried the property and all its burdens as between the parties.

§ 682. In an Ohio Case it was held, —

1st. After liability attaches to a stockholder it is not discharged by the subsequent assignment or transfer of his stock; but the successive assignees or holders, by accepting the stock and the benefits arising therefrom, impliedly undertake to indemnify or discharge the assignor from the liability which attached to him as stockholder while he held the stock.

2d. In a suit by creditors to enforce such liability against the stockholders of an insolvent corporation, the existing stockholders are severally chargeable with the payment of such liability.

3d. If, by reason of insolvency, the amount due from any stockholder is not collectible, the assignors of his stock up to the time the liability attached may be charged with the deficiency.<sup>1</sup>

§ 683. A Colorable<sup>0</sup> Transfer, or an out and out transfer to an

<sup>1</sup> § 681. *Lesassier v. Kennedy*, 36 La. Ann. 539 (1884).

<sup>1</sup> § 682. *Brown v. Hitchcock*, 36 Ohio St. 667.

The liability of a stockholder continues even after the expiration of the charter of the bank. *Elson v. Wright*, 134 Iowa 634, 112 N. W. 105 (1907).

<sup>0</sup> § 683. The fact that a transfer is made when the bank is insolvent does not make the transfer colorable if the vendee is not aware of the insolvency. *Earle v. Carson*, 188 U. S. 42, 47 L. ed. 373, 23 Sup. Ct. 254 (1902).

irresponsible <sup>0a</sup> person to escape liability, or a transfer to the bank with a knowledge of its insolvency, <sup>0b</sup> is not good against creditors <sup>0c</sup> of the bank, as where a corporation transferred its shares in a bank to one of its own clerks on the understanding that they should be retransferred on request.<sup>1</sup> A *purchaser* of national bank shares cannot evade liability by causing the transfer to be made to an irresponsible person.<sup>2</sup> Such a case differs from the following case of the pledgee in 111 United States Reports; for here the purchaser is liable as the one holding the beneficial interest.

Transfer of stock cannot be made after liquidation of the bank so as to avoid liability thereon;<sup>3</sup> and an assignment for the benefit of creditors is subject to the statutory liability of stock assigned

<sup>0a</sup> Unless the bank was insolvent at the time of the sale to the actual or constructive knowledge of the transferor, and the transferee insolvent to the actual or constructive knowledge of the transferor he is not liable. *McDonald v. Dewey*, 134 Fed. 528 (1905).

<sup>0b</sup> If there is no knowledge of the insolvency the transfer is good and the transferor may retain the money although the bank is actually insolvent at the time. *Corn v. Skillern*, 75 Ark. 148, 87 S. W. 142 (1905); *McDonald v. Dewey*, 202 U. S. 510, 50 L. ed. 1128, 26 Sup. Ct. 731 (1906).

In New York if a stockholder transfers his stock while the bank is insolvent he cannot escape liability, and it is immaterial that he did not know or have reason to know of such insolvency. *Persons v. Gardner*, 113 App. Div. 597 (1906), 98 N. Y. S. 807; *id.*, 188 N. Y. 571, 80 N. E. 1118.

<sup>0c</sup> When the sale is absolute the liability extends only to existing creditors and not to those who become creditors after the transfer. But if the stock stands in the name of a mere agent the owner is liable for the full amount of the assessment of such stock. *McDonald v. Dewey*, 202 U. S. 510, 50 L. ed. 1128, 26 Sup. Ct. 731 (1906).

A retransfer to a responsible person might be a defence to the original transferor. *People's Home Savings Bank v. Rickard*, 139 Cal. 285, 73 Pac. 858 (1903).

<sup>1</sup> *Germania National Bank v. Case*, Receiver, 99 U. S. 628, 25 L. ed. 448; *Crescent City National Bank v. Case*, 99 U. S. 628, 25 L. ed. 448; *Bowden v. Johnson*, 107 U. S. 251, 27 L. ed. 386, 2 Sup. Ct. 246 (1882); *Aldrich v. Bingham*, 131 Fed. 363 (1904); *Fowler v. Crouse*, 175 Fed. 646 (1910); *Rankin v. Fidelity Trust Co.*, 189 U. S. 242, 47 L. ed. 792, 23 Sup. Ct. 553 (1902); *McDonald v. Dewey*, 202 U. S. 510, 50 L. ed. 1128, 26 Sup. Ct. 731 (1906).

The gist of the liability is the fraud implied in selling with notice of the insolvency of the bank and with intent to evade all double liability imposed upon stockholders. *McDonald v. Dewey*, 202 U. S. 510, 50 L. ed. 1128, 26 Sup. Ct. 731 (1906).

<sup>2</sup> *Davis v. Stevens*, 17 Blatchf. 259 (1879); *Cox v. Montague*, 78 Fed. 845; *Stuart v. Hayden*, 72 Fed. 402; *id.* 169, U. S. 1, 42 L. ed. 639, 18 Sup. Ct. 274.

<sup>3</sup> *Muir v. Citizens' National Bank*, 39 Wash. 57, 80 Pac. 1007 (1905). See also *May v. McQuillan*, 129 Mich. 392, 89 N. W. 45 (1902), transfer after suspension.

to one in an insolvent corporation which had closed its doors previous to the assignment.<sup>4</sup>

But if the transfer is made in good faith during the solvency of the bank and has been entered upon the books it is valid, and stockholders are relieved from subsequent liability.<sup>5</sup>

§ 684. **The Pledgee** of national bank stock may have the stock put in the name of a third person, instead of his own, and so avoid responsibility, though gaining the security of the stock. He does not appear on the books as having been owner, and no credit can have been given him, nor has he the beneficial ownership; so that the grounds of liability fail.<sup>6</sup> There is a very interesting case<sup>1</sup> on this point, from which we quote below. The dissent

<sup>4</sup> *Graham v. Platt*, 28 Colo. 421, 65 Pac. 30 (1901).

<sup>5</sup> See *Earle v. Carson*, 188 U. S. 42, 47 L. ed. 373, 23 Sup. Ct. 254 (1902), affirming 107 Fed. 639; *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626 (1906); *Bracken v. Nicol*, 124 Ky. 628, 99 S. W. 920, 11 L. R. A. (N. S.) 818 (1907); *Assets Realization Co. v. Howard*, 211 N. Y. 430, 105 N. E. 680 (1914), affirming 152 App. Div. 900, 136 N. Y. S. 1130; *Persons v. Gardner*, 113 App. Div. 597 (1906), 98 N. Y. S. 807, affirmed in 188 N. Y. 571, 80 N. E. 1118; *Man v. Boykin*, 79 S. C. 1, 60 S. E. 17, 128 Am. St. Rep. 830 (1908).

Under New York law both a vendor and vendee are liable. *Mosler Safe Co. v. Guardian Trust Co.*, 153 App. Div. 117 (1912), 138 N. Y. S. 298, affirmed in 208 N. Y. 526, 101 N. E. 786.

<sup>6</sup> § 684. If the pledgee subsequently becomes owner of the stock, or appears on the books as the owner he becomes liable. *Ohio Valley National Bank v. Hulitt*, 204 U. S. 162, 51 L. ed. 423, 27 Sup. Ct. 179 (1906); *Hurlburt v. Arthur*, 140 Cal. 103, 73 Pac. 734, 98 Am. St. Rep. 17 (1903); *Adams v. Clark*, 36 Colo. 65, 85 Pac. 642 (1906).

If the pledgee retransfers stock standing in his name he is not liable for debts subsequently contracted without knowledge that the stock had stood in his name. *Brunswick Terminal Co. v. National Bank*, 112 Fed. 812 (1901); *id.* 192 U. S. 386, 48 L. ed. 491, 24 Sup. Ct. 314 (1904).

A pledgee may avoid responsibility by having the stock transferred in blank by the pledgor. But in such case the pledgor does not cease to be the owner in the sense intended by the banking law. *Hulitt v. Ohio Valley National Bank*, 137 Fed. 461 (1905). He may also avoid responsibility by surrendering the stock. *Corbin Banking Co. v. Mitchell*, 141 Ky. 172, 132 S. W. 426, 31 L. R. A. (N. S.) 446 (1910); and if he transfers it to a third person as a trustee for both parties he is not liable for an assessment. *Hayes v. Fidelity Ins. etc. Co.*, 105 Fed. 160 (1900).

A pledgee of stock holds it subject to the right of the Secretary of State to require an assessment upon it to restore impaired capital of the bank. *Corbin Banking Co. v. Mitchell*, 141 Ky. 172, 132 S. W. 426, 31 L. R. A. (N. S.) 446 (1910).

<sup>1</sup> *Anderson, Receiver v. Philadelphia Warehouse Co.*, 111 U. S. 479, 28 L. ed. 478, 4 Sup. Ct. 525 (1884). See *Williamson v. American Bank*, 185 Fed. 66 (1911); *Rankin v. Fidelity Trust Co.*, 189 U. S. 242, 47 L. ed. 792, 23 Sup. Ct. 553 (1902).

does not seem to us well founded. There is no evasion of law so long as those whose names have once appeared on the books as owners are not allowed fraudulently to shake off responsibility, and the beneficial owner is held. A contract between such beneficial owner and his pledgee might be void as to creditors of the beneficial owner if the latter were in failing circumstances and the transaction constituted a fraudulent preference; otherwise, it is impossible to see how the creditors of the bank can have anything to do with such a contract, with one whose name never appears on its books.

“A pledgee of shares of stock in a national bank who in good faith and with no fraudulent intent takes the security for his benefit in the name of an irresponsible trustee for the avowed purpose of avoiding individual liability as a shareholder, and who exercises none of the powers or rights of a stockholder, incurs no liability as such to creditors of the bank in case of its failure. Blumer & Co. failed in 1877, largely indebted to the Warehouse Co., which still held as security the stock standing in the name of Ferris. The failure of Blumer & Co. crippled the bank so that it never afterwards paid a dividend, and on the 15th of April, 1878, it was put into insolvency by the Comptroller of the Currency, and a receiver appointed. It is well settled that one who allows himself to appear on the books of a national bank as an owner of its stock is liable to creditors as a shareholder; whether he be the absolute owner or a pledgee only, and that if a registered owner, acting in bad faith, transfers his stock in a failing bank to an irresponsible person, for the purpose of escaping liability, or if his transfer is colorable only, the transaction is void as to creditors. *National Bank v. Case*, 99 U. S. 628, 25 L. ed. 448; *Bowden v. Johnson*, 107 U. S. 251, 27 L. ed. 386, 2 Sup. Ct. 246. It is also undoubtedly true that the beneficial owner of stock registered in the name of an irresponsible person may, under some circumstances, be liable to creditors as the real shareholder; but it has never, to our knowledge, been held that a mere pledgee of stock is chargeable where he is not registered as owner. There was nothing on the books of the bank to connect M'Closkey with the Warehouse Co., and therefore no credit could have been given on account of the apparent liability of the company as a shareholder. If inquiries had been made and all the facts ascertained, it would have been found that either Kern or Blumer & Co. were always the real owners of the stock, and that it had been placed

in the name of the persons who appeared on the registry, not to shield any owner from liability, but to protect the title of the company as pledgee. The avowed purpose of both transfers was to give the company the control of the stock for the purposes of its security, without making it liable as a registered shareholder. To our minds there was neither fraud nor illegality in this. The company perfected its security as pledgee without making itself liable as an apparent owner."

*Dissent.* — "I think if in any case between private persons one of them had placed property in the hands of minors, servants, or other irresponsible persons, for the purpose of escaping the responsibility attaching to the ownership of such property, while securing all the advantages of such ownership, it would be held to be a transaction which could not be supported on any legal or equitable principle. It does not remove this case from the control of that principle, that the parties to be injured are the unknown creditors of the bank, who are by this means deprived of the right which they have to resort to a responsible shareholder for the contribution which the law gives for their benefit. If not an actual fraud, it is a fraud upon the banking law, and was so intended to be by both the original holders of the bank shares and the officers of the Warehouse Co., by which the latter could control the shares without the responsibility which the law attaches to the owner. It is an easy device to make the right which the law gives to creditors of a failing bank ineffectual, and to evade it in all cases." The trouble with this argument is that the pledgee is not the "owner."

§ 685. **Under the Wisconsin Revised Statutes, 1858, c. 71,** it is the *shareholders at the time of suit* on the debt of the bank, not those at the time the debt accrued, who are liable to the amount of their shares,<sup>1</sup> and the books of the bank determine who are the shareholders. To render a buyer of shares liable, a formal transfer to him on the books of the bank must be shown.<sup>2</sup>

§ 686. **Liability of Estates of Deceased Stockholders.** — Executors who have invested funds of the estate in bank shares, without leave under the will or by law to do so, do not thereby make the estate liable to contribution as a shareholder.<sup>1</sup> Under

<sup>1</sup> § 685. *Cleveland v. Burnham*, 55 Wis. 598, 13 N. W. 677, 680 (1882). See also *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626 (1906).

<sup>2</sup> *Cleveland v. Burnham*, 64 Wis. 347, 25 N. W. 407 (1885).

<sup>1</sup> § 686. *Diven v. Lee*, 36 N. Y. 302.



R. S. §§ 5151, 5152, assets which have been transferred to devisees or legatees of the deceased cannot be subjected to liabilities of the bank accruing after the transfer.<sup>2</sup> But if the liability accrues before the actual transfer, (though the bank did not fail till after the court had ordered the legacy paid,) the assets are chargeable with an assessment on the testator's stock.

Such liability does not terminate with the death of the stockholder.<sup>3</sup> And under R. S. §§ 5151, 5152, the liability is enforceable against the estate although the time for presenting and allowing claims under the State law has expired.<sup>4</sup>

§ 687. **Necessary Preliminaries to Suits against Shareholders.** — Whether any, and if so what, proceedings are necessary, as preliminary to the suit by the creditor against the stockholder, is a matter concerning which the authorities are not wholly uniform. In California the stockholders of a commercial bank are simultaneously and coördinately responsible with the corporation.<sup>1</sup>

And in Missouri it has been held that, upon failure of the bank, the owner of a certificate of deposit may sue a stockholder without any previous demand on the bank.<sup>2</sup> But the better principle seems to be, that recourse should first be had to the corporation, and that some evidence of the incapacity of the corporation to meet the demand should be furnished before the right of action against the individuals will accrue.<sup>3</sup> Such recourse would naturally take the form of a suit at law against the bank; and such evidence could scarcely take a better form than a return of *nulla bona* made by the sheriff upon an execution issued against the corporate property. Though, of course, any evidence which simply *tends* to show a total want of assets on the part of the bank must be open to rebuttal by positive proof of the existence of such assets.<sup>4</sup> In ordinary cases, so long as there are assets which have not been

<sup>2</sup> *Witters v. Sowles*, 32 Fed. 130; *Parker v. Robinson*, 71 Fed. 256; *Tourtlot v. Turke*, 87 Fed. 840; *Baker v. Beach*, 86 Fed. 836.

<sup>3</sup> *Dent v. Matteson*, 70 Minn. 519, 73 N. W. 416 (1897); *Gianella v. Bigelow*, 96 Wis. 185, 71 N. W. 111; *Gager v. Paul*, 111 Wis. 638, 87 N. W. 875 (1901); *Lanigan v. North*, 69 Ark. 62, 63 S. W. 62 (1901).

<sup>4</sup> *Zimmerman v. Carpenter*, 84 Fed. 717; *Rankin v. Miller*, 207 Fed. 602 (1913); *Williams v. Cobb*, 219 Fed. 663 (1914).

But legatees of a stockholder are not liable. *Williams v. Cobb*, *supra*.

<sup>1</sup> § 687. *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110 (1883).

<sup>2</sup> *Hodgson v. Cheever*, 8 Mo. App. 318 (1880).

<sup>3</sup> *Grew v. Breed*, 10 Met. (Mass.) 569; *Cochituate Bank v. Colt*, 1 Gray (Mass.) 382; *Wilson v. Book*, 13 Wash. 676, 43 Pac. 939.

<sup>4</sup> *Payne v. Bullard*, 23 Miss. 88; *Hewett v. Adams*, 50 Me. 271; 54 *id.* 206; *Thornton v. Lane*, 11 Ga. 459; *Harris v. Lane*, 16 *id.* 217.

divided among the creditors, the shareholders cannot be looked to.<sup>4a</sup> A dividend consuming the whole property ought first to be declared, and it will be no excuse for a suit brought before its declaration that it has been postponed indefinitely for the purpose of preventing a sacrifice of the property. It is to be inferred from the cited cases that such postponement is improper. The creditors are entitled to immediate payment, and cannot be held to wait, perhaps for years, until the parties having charge of the assets have brought them into a condition to be advantageously turned into money. The difficulty of disposing of them at once, in order to excuse the failure to do so, must be something verging upon temporary impossibility. But in that case the right of the creditor to immediate payment will be regarded as paramount to the right of the stockholder to have the assets first exhausted. The court may then order an apportionment of the corporate debts among the shareholders. For it is just that, if any such inevitable delay is to be encountered in winding up the affairs, the hardships induced by it should be borne rather by the parties who owe, than by those to whom the debt runs.<sup>5</sup>

In Nebraska, in an action brought to enforce the liability of stockholders in a banking corporation, the amount due the creditors from the corporation must be judicially ascertained, *i.e.* there must be a finding and judgment, or a decree as to such amount;<sup>5a</sup> and the assets of the corporation must be exhausted before stock-

<sup>4a</sup> In some states liability may be enforced before the receiver has converted and applied all the assets. *Lamar v. Taylor*, 141 Ga. 227, 80 S. E. 1085 (1914); *Smathers v. Western Carolina Bank*, 135 N. C. 410, 47 N. E. 893 (1904). But see *Flynn v. American Banking etc. Co.*, 104 Me. 141, 69 Atl. 771, 129 Am. St. Rep. 378, 19 L. R. A. (N. s.) 428 (1908); *Hazlett v. Woodhead*, 28 R. I. 452, 67 Atl. 736 (1906).

<sup>5</sup> *In re Reciprocity Bank*, 29 Barb. (N. Y.) 369; 22 N. Y. 9.

<sup>5a</sup> *German National Bank v. Farmers & Merchants' Bank*, 54 Neb. 593, 74 N. W. 1086; *Hastings v. Barnd*, 55 Neb. 93, 75 N. W. 49; *Van Pelt v. Gardner*, 54 Neb. 702, 75 N. W. 874; *State v. German Savings Bank*, 65 Neb. 416, 91 N. W. 414 (1902); *Flynn v. American Banking etc. Co.*, 104 Me. 141, 69 Atl. 771, 129 Am. St. Rep. 378, 19 L. R. A. (N. s.) 428, n. (1908); *Miller v. Connor*, 177 Mo. App. 630, 160 S. W. 630 (1913); *Richards v. Gill*, 138 App. Div. 75 (1910), 122 N. Y. S. 620. But see *Conway v. Owensboro Savings Bank & Tr., Co.*, 165 Fed. 822 (1908); *Mosler Safe Co. v. Guardian Trust Co.*, 208 N. Y. 524, 101 N. E. 786, modifying 153 App. Div. 117 (1912), 138 N. Y. S. 298.

The receiver of the bank must include non-resident stockholders in the equity suit in Nebraska so as to determine their liability. *Hazlett v. Woodhead*, 27 R. I. 506, 63 Atl. 562 (1906); and in such proceedings the non-resident stockholders must have had notice or must have been parties therein. *Hazlett v. Woodhead*, 28 R. I. 452, 67 Atl. 736 (1907).

holders are liable.<sup>5b</sup> But it is not necessary that a receiver of an insolvent bank procure execution against himself and a return of *nulla bona* on all claims against the bank before commencing action to enforce stockholders' liability.<sup>5c</sup> However, in an action against an insolvent bank for the purpose of the appointment of a receiver and winding up its affairs, where there is no personal service of the summons on the bank and the bank does not voluntarily appear, no ascertainment of its indebtedness can be determined upon which to predicate an action to enforce the stockholders' liability.<sup>5d</sup>

In Massachusetts no suit may be maintained until a judgment has been recovered against the corporation and it has neglected for thirty days after demand made on execution to pay the amount due, or to exhibit property of the corporation subject to be taken on execution, sufficient to satisfy the demand and the execution has been returned unsatisfied.<sup>5e</sup>

In North Carolina a receiver may recover from a stockholder only upon it appearing that there is a deficit in the other assets of the bank; but it is not necessary that the assets be "completely exhausted" before suit may be brought.<sup>5f</sup> The allegation must show when the stockholders became such.<sup>5f</sup>

In Iowa it is necessary that a stockholder be brought into court as a party before an assessment is binding upon him.<sup>5g</sup>

"The ascertainment of the debts and liabilities of the bank and the judicial determination of the necessity and the requisite extent of the enforcement of the stockholders' liability are essential prerequisites to the collection of the amounts owing by them and the insolvent bank is a necessary party to these adjudications." <sup>5h</sup>

<sup>5b</sup> *Hamilton National Bank v. American Loan Co.*, 66 Neb. 67, 92 N. W. 189 (1902); *Holcomb v. Tierney*, 79 Neb. 660, 113 N. W. 204 (1907).

<sup>5c</sup> *Brinkworth v. Hazlett*, 64 Neb. 592, 90 N. W. 537 (1902). See *Cheney v. Scharmann*, 145 App. Div. 456 (1911), 129 N. Y. S. 993; *Van Tuyl v. Sullivan*, 173 App. Div. 391, (1915) 156 N. Y. S. 309.

<sup>5d</sup> *Holcomb v. Tierney*, 79 Neb. 660, 113 N. W. 204 (1907).

<sup>5e</sup> *Nichols v. Taunton Safe Deposit etc. Co.*, 203 Mass. 551, 89 N. E. 1035 (1909).

<sup>5f</sup> *Smathers v. Western Carolina Bank*, 135 N. C. 410, 47 S. E. 893 (1904).

<sup>5g</sup> *Elson v. Wright*, 134 Iowa 634, 112 N. W. 105 (1907).

<sup>5h</sup> *King v. Pomeroy*, 121 Fed. 287 (1902); *McDonald v. Thompson*, 184 U. S. 71, 46 L. ed. 437, 22 Sup. Ct. 297 (1902). *Rankin v. Miller*, 207 Fed. 602 (1913).

In South Carolina the creditors of an insolvent bank are not required to exhaust the assets of the bank before suing the stockholders on their liability fixed by law.<sup>54</sup>

The stockholders have a right to have the liability of officers of the bank for neglect of duty and mismanagement ascertained and enforced in order that they may be relieved *pro tanto* from the payment of their double liability, which is only a secondary or conditional asset.<sup>55</sup>

In Illinois the Auditor of Public Accounts must give thirty days' notice to the President or one performing his duties in order that the impairment may be made good before proceeding against stockholders.<sup>56</sup>

In Minnesota the stockholders of a reorganized bank are primarily liable for the debts of the old bank, and all remedies against them should be exhausted before resorting to stockholders who did not become members of the new bank.<sup>57</sup>

There must be a levy of an assessment before a stockholder can be sued to enforce his liability.<sup>58</sup>

A judgment against a banking corporation, which is notoriously insolvent and which has all its assets under attachment, is not essential to the right of creditors to enforce statutory individual liability of stockholders.<sup>59</sup>

In Arkansas the complainant must allege the number of shares of stock issued by the insolvent corporation, the numbers of shares held by the shareholders respectively, the amount of the debt of the corporation and the date when created.<sup>60</sup>

**Georgia, Alabama.** — But, upon the other hand, it has been held in Georgia, where this whole matter has been the subject of much litigation, that when the statute makes both directors and shareholders liable, the liability will, in the absence of distinct language to the contrary, be joint, and not several; and the liability of the shareholders will be primary and original, and not secondary and collateral to that of the directors; and will

<sup>54</sup> Buist v. Williams, 81 S. C. 495, 62 S. E. 859 (1908).

<sup>55</sup> Clark v. Bank of Union, 72 W. Va. 491, 78 S. E. 785 (1913); Benedum v. Citizens' Bank, 72 W. Va. 124, 78 S. E. 656 (1913).

<sup>56</sup> People v. Milwaukee Ave. State Bank, 230 Ill. 505, 82 N. E. 853 (1907). But see Rankin v. Miller, 207 Fed. 602 (1913), holding that notice is not a prerequisite to suit.

<sup>57</sup> Willius v. Mann, 91 Minn. 494, 98 N. W. 341 (1904).

<sup>58</sup> Covell v. Fowler, 144 Fed. 535 (1906).

<sup>59</sup> Latimer v. Citizens' State Bank, 102 Iowa, 162, 71 N. W. 225.

<sup>60</sup> Richardson v. Boot, 18 Colo. App. 140.<sup>o</sup>

not require that of the directors to be first resorted to.<sup>6</sup> Again, in Alabama, it was held that the holders of the circulating notes or bills of a foreign banking corporation, which had become insolvent, might bring their bill in equity, charging fraud and seeking a discovery and an accounting, making the directors, stockholders, and agents of the company respondents, without first obtaining a judgment at law.<sup>7</sup> This case, however, is somewhat beside the precise question; and the Georgia cases can hardly be allowed to overrule those cited to sustain the doctrine of the preceding paragraph, which is also fortunate in having the support of sound reason in addition to judicial authority. Only one remark, in the cited case of *Lane v. Morris*, is worthy of note. It is to the effect that the liability of the stockholders cannot be enforced by the receiver or assignee of the corporation, since it constitutes no part of the assets of the bank. The rule seems to be sound, and in the absence of statutory provision to the contrary, it must be regarded as clear that the suit should be brought directly by the creditor against the stockholder. But though this draws after it the corollary that the right of action against the shareholder is independent of that against the bank, it is far from implying that the two suits may be prosecuted contemporaneously, or that the one against the shareholder may precede the other.

§ 688. **Judgment against the Bank does not conclude a Stockholder.** — Even in cases where a judgment has been actually recovered against the bank, it does not absolutely conclude a shareholder. If an effort is made to levy the execution issued under such judgment upon his property, he will be allowed to bring his writ of error to obtain a reversal. For though he was not strictly and technically a party to the suit, and would not even have been allowed to appear and defend it, though his private property had been attached in it,<sup>1</sup> yet his interest in its result and his personal liability thereby entailed make him privy to it; and justice required that, since the proceedings did not profess to conclude him personally, and did not directly summon him as a defendant

<sup>6</sup> *McDougald v. Lane*, 18 Ga. 444; *Robinson v. Bank of Darien*, 18 *id.*, 109; *Robinson v. Bealle*, 20 *id.* 275; *Lane v. Morris*, 8 *id.* 468; *Belcher v. Wilcox*, 40 *id.* 396; *Jones v. Wiltberger*, 42 *id.*, 575.

Whether the liability of a stockholder is primary or secondary depends much upon the language of the particular statute. *Lamar v. Taylor*, 141 Ga. 228, 80 S. E. 1085 (1914).

<sup>7</sup> *Bank of St. Mary's v. St. John*, 25 Ala. 566.

<sup>1</sup> § 688. *Whitman v. Cox*, 26 Me. 335; *Merrill v. Shaw*, 38 *id.* 267.

to attend to and contest it, he should have the opportunity afterwards to be heard before his property is taken from him.<sup>2</sup> A judgment against the bank is *prima facie* evidence of liability of the stockholders.<sup>3</sup>

§ 689. **Interest.** — In Georgia it has been held that where the stockholder is sued by the holder of circulating bills of the bank, interest upon the amount of the bills can be recovered only from the date at which demand of payment was made upon the defendant individually, and not from the time of demand upon the bank.<sup>1</sup> But in Massachusetts it has been held that a stockholder is not liable to pay any interest at all on bank bills.<sup>2</sup>

In Maine if the assets of the corporation when fully administered are sufficient only for the payment of the principal of the corporation debts, such interest may be recovered from the shareholders as would have been recovered from the corporation had it continued solvent.<sup>3</sup>

In Michigan when an assessment is levied on a stockholder of an insolvent bank by its receiver the claim becomes liquidated and draws interest until paid.<sup>4</sup> Interest does not begin to run when the bank is closed, but only from the time when the court

<sup>2</sup> Rankin v. Sherwood, 33 *id.* 509; Schrader v. Manufacturers' Bank, 133 U. S. 67, 33 L. ed. 564, 10 Sup. Ct. 238; Willius v. Mann, 91 Minn. 494, 98 N. W. 341 (1904); Martin v. Wilson, 120 Fed. 202 (1903); Childs v. Cleaves, 95 Me. 498, 50 Atl. 714 (1901). But see Assets Realisation Co. v. Howard, 211 N. Y. 430, 105 N. E. 680 (1914), affirming, 152 App. Div. 900, 136 N. Y. S. 1130.

<sup>3</sup> Grand Rapids Savings Bank's Appeal, 52 Mich. 557, 18 N. W. 356 (1884); Union National Bank v. Halley, 19 S. D. 474, 104 N. W. 213 (1906); Covell v. Fowler, 144 Fed. 535 (1906); Willius v. Mann, *supra*; Miller v. Connor, 177 Mo. App. 630, 160 S. W. 582 (1913). See Francis v. Hazlett, 192 Mass. 137, 78 N. E. 405, 116 Am. St. Rep. 230 (1906), where the stockholders were concluded by a judgment in an action in which the bank was a party.

A judgment against a corporation binds the stockholders so far as the rights of the creditor to enforce his claim against the corporate assets is concerned. It is conclusive against the stockholder in a suit to recover the amount of an unpaid subscription; but it does not bind the stockholders in a subsequent suit against them to enforce an individual liability provided for in the charter unless it expressly declares that he is so bound. Wheatley v. Glover, 125 Ga. 710, 54 S. E. 626 (1906).

<sup>1</sup> § 689. Lane v. Morris, 10 Ga. 162.

<sup>2</sup> Crease v. Babcock, 10 Met. (Mass.) 525; Grew v. Breed, *id.* 569.

<sup>3</sup> Flynn v. American Banking etc. Co., 104 Me. 141, 69 Atl. 771, 129 Am. St. Rep. 378, 19 L. R. A. (N. S.) 428, n. (1908).

<sup>4</sup> May v. Ullrich, 132 Mich. 6, 92 N. W. 493 (1902).

determines that it is necessary to enforce the stockholders' liability.<sup>5</sup>

§ 690. **Defences in Suits against Shareholders.** — It is not sufficient for the plaintiff to allege in his suit against the shareholder that he is under a liability to pay. An actual consideration must have passed from the plaintiff. Thus, if his suit be upon the bills of the bank, he must be the holder of them for value; and this not only to bring him within the above rule, but also because unless he holds the bills, and is therefore in a position to surrender them, and so to prevent future suits and recoveries upon these identical bills, he cannot be allowed to have judgment against the stockholder. For the stockholder is entitled to this protection no less than the bank itself, in whose place, so far as the redemption of the bills in question goes, he will stand by virtue of his payment of them.<sup>1</sup> The obligation of the bank is only to redeem upon presentation and surrender, or proof of actual destruction of specific and described bills, and his obligation cannot be extended in excess of that of the bank, whose default alone he is to make good. If the stockholder can show that as a matter of fact the directors, in creating or permitting the indebtedness for the discharge of which a contribution is sought, exceeded their proper authority, and that the creditor then knew or ought to have known that their action was thus beyond their powers, he will establish a good and sufficient defence as towards this creditor.<sup>2</sup> For though the shareholders make the directors their general agents, still the functions of those agents are matter of custom and of common knowledge. If they stretch their powers

<sup>5</sup> *Wedemeyer v. Hindelang*, 161 Mich. 600, 126 N. W. 708 (1910).

<sup>1</sup> § 690. *Pollard v. Stockholders of Kentucky Exporting Co.*, 4 J. J. Marsh. (Ky.) 52.

In a suit against a stockholder it is only necessary to allege that a judgment has been rendered against the corporation. The stockholder is let in to all defences appropriate to one ultimately liable and also to all defences the corporation might have set up in the suit against it. *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626 (1906).

The complaint must show when the defendants became stockholders and when the debts were contracted. *Smathers v. Western Carolina Bank*, 135 N. C. 410, 47 S. E. 893 (1904).

<sup>2</sup> *Leavitt v. Yates*, 4 Edw. Ch. (N. Y.) 134.

When a national bank is sued for assessment on stock which it holds it may set up the defence that it is *ultra vires* for it to take stock in a speculative corporation or a partnership. *First National Bank v. Converse*, 200 U. S. 425, 50 L. ed. 537, 26 Sup. Ct. 306 (1905); *Merchants' National Bank v. Wehrmann*, 202 U. S. 295, 50 L. ed. 1036, 26 Sup. Ct. 613 (1906), reversing, 69 Ohio St. 160, 68 N. E. 1004 (1903).

to the execution of acts beyond the scope which ordinary custom has marked out as appurtenant to their office, they will bind their principals only provided that they have been invested with a real extraordinary authority, or have been clothed with such a semblance of it that the injured party was naturally deceived, without ignorance or other species of default upon his own part. But for their wrongful acts within the scope of their powers, as by the over-issue of bills for circulation, the shareholders will be liable to any innocent creditor who became such by virtue of the wrongful act, but without knowledge if it it.<sup>3</sup>

In an action to recover an assessment upon a stockholder of an insolvent bank, it is no defence that the original capital stock was never paid in, where the bank has conducted business as such for six years.<sup>4</sup>

It is no defence, after insolvency of the bank, for a stockholder to set up that there were irregularities in the transfer of the stock to more or less remote predecessors in title,<sup>5</sup> or that the receiver was in possession of unreported assets.<sup>6</sup>

It is no defence in an action by a special receiver to collect a judgment upon a claim which the court allowed to be established in a separate suit, that the claim was not filed with the receiver in the original suit,<sup>7</sup> unless the plaintiff is a foreign receiver, in which case the defence is good.<sup>7</sup>

In an action brought by the superintendent of banks to enforce the liability of a stockholder, a claim that the trust company owes the defendant is not a good defence;<sup>8</sup> nor can it be set up as a counter claim, nor can stockholders who are by statute equally and ratably responsible for the debts of the corporation and who are creditors set off against their liability as stockholders, claims which they have against the corporation.<sup>8</sup>

It is no defence after the insolvency of the bank for a stockholder to show that he has not received a certificate, or that after holding stock two years he then brought a suit against the insolvent

<sup>3</sup> *McDougald v. Bellamy*, 18 Ga. 411; *Grew v. Breed*, 10 Met. (Mass.) 569.

<sup>4</sup> *Wallace v. Hood*, 89 Fed. 11; *Maine Trust and Banking Co. v. Southern Loan and Trust Co.*, 92 Me. 444, 43 Atl. 24.

<sup>5</sup> *Home Savings, etc. v. Case*, 18 Ont. App. 498.

<sup>6</sup> *Brinkworth v. Hazlett*, 64 Neb. 592, 90 N. W. 537 (1902).

<sup>7</sup> *Covell v. Fowler*, 144 Fed. 535 (1905).

<sup>8</sup> *Van Tuyl v. Schwab*, 165 App. Div. 412 (1914), 150 N. Y. S. 786.



corporation to rescind the subscription on account of fraud, or that he gave notes for the stock which were unpaid.<sup>9</sup>

That the stockholder is a resident of another state and was not a party in the original suit and did not appear therein and could not have been required to do so is a good defence.<sup>10</sup>

It is no defence that the stockholder is a creditor of the bank to the amount of a proportional share of the surplus;<sup>11</sup> or that a stockholder has paid an assessment on his stock levied pursuant to orders given by the public examiner acting under the provision of section 3000 R. L. 1905;<sup>12</sup> or has paid his full quota to an individual creditor;<sup>12</sup> or that the original purchase of the stock was unauthorized if dividends have been received thereon for a number of years;<sup>13</sup> or that a signature attached to a resolution to change the name of the bank, was not properly authenticated;<sup>13</sup> or to a stockholder in the original bank but not in the reorganized bank that certificates of deposit were issued by the reorganized bank as evidence of its debt, unless the creditors accepted them in payment of their claims,<sup>14</sup> or that there was fraud or illegality in the organization of the bank,<sup>15</sup> or that the transfer of stock was fraudulent, especially where no complaint was made until the bank failed eighteen months thereafter,<sup>16</sup> or that no certificate was filed with the secretary of state,<sup>17</sup> or that there was fraud in procuring his subscription,<sup>18</sup> unless the equity to rescind is superior to the rights of creditors,<sup>19</sup> or that there was a repeal of the statute creating his liability, unless it was without any provision concerning pending litigation.<sup>20</sup>

But it is a defence that the judgment was rendered without

<sup>9</sup> *Robertson v. Conway*, 188 Fed. 579 (1911).

<sup>10</sup> *Hunt v. Whewell*, 122 Wis. 33, 99 N. W. 599 (1904); *Wighton v. Bosler*, 102 Fed. 70 (1900).

<sup>11</sup> *Wedemeyer v. Hindelang*, 161 Mich. 600, 126 N. W. 708 (1910).

<sup>12</sup> *Northwestern Trust Co. v. Bradbury*, 117 Minn. 83, 134 N. W. 513, 1913D Ann. Cas. 69, n.

<sup>13</sup> *Hunt v. Hauser Malting Co.*, 95 Minn. 206, 103 N. W. 1032 (1905), affirming *id.*, 90 Minn. 282, 96 N. W. 85 (1903).

<sup>14</sup> *Willius v. Mann*, 91 Minn. 494, 98 N. W. 341 (1904).

<sup>15</sup> *Silvain v. Benson*, 83 Wash. 271, 145 Pac. 175 (1915).

<sup>16</sup> *Robinson-Pettit Co. v. Sapp*, 160 Ky. 445, 169 S. W. 869 (1914).

<sup>17</sup> *Mann v. Boykin*, 79 S. C. 1, 60 S. E. 17, 128 Am. St. Rep. 830 (1908).

<sup>18</sup> *Wilkes v. Knight*, 142 Ga. 458, 83 S. E. 89 (1914); *Davis v. Burns*, 173 S. W. 476 (Tex. Civ. App.) (1914); *Farmers' State Bank v. Empey*, 35 S. D. 107, 150 N. W. 936 (1915); *Robertson v. Conway*, 188 Fed. 579 (1911); *Ryan v. Mt. Vernon National Bank*, 224 Fed. 429 (1915).

<sup>19</sup> *Farmers' State Bank v. Empey*, *supra*.

<sup>20</sup> *Union Savings Bank v. Leiter*, 145 Cal. 696, 79 Pac. 441 (1905).

jurisdiction or secured by fraud,<sup>21</sup> or that items are improper or excessive,<sup>22</sup> or that the comptroller was guilty of laches in collecting assessments.<sup>23</sup>

§ 691. **Set-off.** — Where one is a creditor as well as a stockholder, he cannot avail himself of the debt owing to him by the bank by way of set-off to diminish his contributory share.<sup>1</sup> His liability as a contributor for the benefit of creditors must be distinguished from his character as a simple contract debtor to the bank upon ordinary business transactions. In the latter case, we have seen that he enjoys the right of set-off even when his claim is based only upon the circulating paper of the corporation. But a stockholder having by assignment a judgment in favor of a noteholder may set it off against his liability.<sup>2</sup>

Stockholders in a bank cannot set off their interest in the surplus after its insolvency, to defeat or diminish their statutory liability for the benefit of creditors.<sup>3</sup>

§ 692. **Contribution.** — A stockholder who has paid a judgment in a suit against him on his individual charter liability may enforce contribution.<sup>1</sup>

### *No Contribution to Guilty Officer*

If the plaintiff is shown to have been an officer of the bank, and to have been guilty of malversation in office, he will be able to make out no case for contribution against a shareholder who proves these facts.<sup>2</sup> In like manner, one who, though not an officer, has yet taken part in the illegal organization of the corporation, will not be allowed to sustain a suit against a shareholder, even though his debt is of so favored a nature as the circulating

<sup>21</sup> Choate v. Boyd, 59 Kan. 682, 54 Pac. 1042 (1898).

<sup>22</sup> Buist v. Williams, 81 S. C. 495, 62 S. E. 859 (1908).

<sup>23</sup> Rankin v. Miller, 207 Fed. 602 (1913).

<sup>1</sup> § 691. Garrison v. Howe, 17 N. Y. 458; *In re Empire City Bank*, 18 N. Y. 199; Wingate v. Orchard, 75 Fed. 241; Sheafe v. Larimer, 79 Fed. 921; Sowles v. Witters, 39 Fed. 403; Parker v. Carolina Savings Bank, 53 S. C. 583, 31 S. E. 673; Williams v. Rose, 218 Fed. 898 (1914).

<sup>2</sup> Marr v. Bank of West Tennessee, 4 Lea (Tenn.) 578 (1880).

<sup>3</sup> Wedemeyer v. Hindelang, 161 Mich. 600, 126 N. W. 708 (1910). See Mosler Safe Co. v. Guardian Trust Co., 208 N. Y. 524, 101 N. E. 786, modifying 153 App. Div. 117 (1912), 138 N. Y. S. 298. But see Strauss v. Denny, 95 Md. 690, 53 Atl. 571 (1902); Cahill v. Original Big Gun Benefit Ass'n, 94 Md. 350, 50 Atl. 1044, 89 Am. St. Rep. 434 (1902).

<sup>1</sup> § 692. Wincock v. Turpin, 96 Ill. 135 (1880).

<sup>2</sup> McDougald v. Bellamy, 18 Ga. 411.

bills of the bank.<sup>3</sup> When the liability of the shareholders is confined to the redemption of the circulating paper, they cannot be held to contribute for the redemption of bills in the hands of one who took them from the bank simply as security, and upon the especial agreement that they should be held by him as such, and should not be put in circulation.<sup>4</sup>

§ 693. **Nature<sup>o</sup> and Extent of the Remedy against Shareholders.** — The capital stock of the bank is, of course, primarily liable for the debts of the bank. But where the capital of the bank is divided and paid back, in whole or in part, to the shareholders, the amount may be followed into their hands by unsatisfied creditors of the corporation, even though the statute of incorporation protects the shareholders from personal liability for the indebtedness.<sup>1</sup> General principles would lead, without doubt, to the conclusion that the creditors ought properly to seek their remedy against the shareholders in equity,<sup>1a</sup> unless the phraseology of some especial statute should authorize a divergence from these principles. Clearly the creditors ought to share equally the funds which must be contributed by the shareholders.<sup>1b</sup> But if any single creditor can sue any single shareholder, great in-

<sup>3</sup> *Robinson v. Lane*, 19 Ga. 337.

<sup>4</sup> *Johnston v. Southwestern R. R. Bank*, 3 Strobb. Eq. (S. C.) 263.

<sup>o</sup> § 693. The liability of a stockholder for the debts of the corporation is ordinarily secondary and not primary. *Assets Realization Co. v. Howard*, 211 N. Y. 430, 105 N. E. 680 (1914); *Smathers v. Western Carolina Bank*, 135 N. C. 410, 47 S. E. 893 (1904).

<sup>1</sup> *Wood v. Dummer*, 3 Mason (C. C.) 308.

<sup>1a</sup> *German National Bank v. Farmers & Merchants' Bank*, 54 Neb. 593, 74 N. W. 1086; *Parker v. Carolina Savings Bank*, 53 S. C. 583, 31 S. E. 673; *Gager v. Paul*, 111 Wis. 638, 87 N. W. 875 (1901); *Hazlett v. Woodhead*, 27 R. I. 506, 63 Atl. 952 (1906); *Toll v. Cobbey*, 22 Colo. App. 244 (1912); *Covell v. Fowler*, 144 Fed. 535 (1906); *Adams v. Clark*, 36 Colo. 65, 85 Pac. 642 (1906); *Mortimer v. Potter*, 213 Ill. 128, 72 N. E. 817 (1904); *Mosler Safe Co. v. Guardian Trust Co.*, 153 App. Div. 117 (1912), 138 N. Y. S. 298. See *Dill v. Ebey*, 27 Okla. 584, 112 Pac. 973, 46 L. R. A. (N. S.) 440, n. (1910).

<sup>1b</sup> When the insolvency is due to the gross mismanagement and neglect of directors who are creditors, they may in a proper case be postponed as creditors until the debts of all other creditors have been fully paid. *Elliott v. Farmers' Bank*, 61 W. Va. 641, 57 S. E. 242 (1907).

In South Dakota a single creditor may sue one or more stockholders and recover the full amount of the stockholders' liability. *Union National Bank v. Halley*, 19 S. D. 474, 104 N. W. 213 (1905). See *Mosler Safe Co. v. Guardian Trust Co.*, 208 N. Y. 524, 101 N. E. 786, modifying 153 App. Div. 117 (1912), 138 N. Y. S. 298; *Shuey v. Adair*, 24 Wash. 378, 64 Pac. 536 (1901); *Elson v. Wright*, 134 Iowa 634, 112 N. W. 105 (1907).

equality will necessarily be produced, an immense number of suits will be instituted, and the temptation will be great for fraudulent arrangements between individual creditors and those among the shareholders who are more easily come at to be sued, and who are more likely to be solvent when the judgment is obtained. Multitudes of the smaller creditors, and probably those who are least able either to lose the money or to take the necessary means for recovering, and who therefore most need the protection of precisely such legislation, would be practically ousted of the relief which the statute would pretend to provide. But proceedings in equity would render the remedy thorough and equal, and in every respect what it ought to be and what it assumes to be. The bill, as is customary in proceedings of a similar character, should be brought either by all the creditors, or by one or more creditors for the benefit also of all such as should afterwards seek to come in and bear their proportion of the expenses. This method has been adopted in Kentucky, Colorado, Massachusetts, Maine, Minnesota, Nebraska, and Wisconsin.<sup>2</sup> It has also been approved as a proper method in New York;<sup>3</sup> although in this State it has been held that a suit at law will lie in favor of a single creditor against a single shareholder.<sup>4</sup> And it has been said in the Circuit Court of the United States for the First Circuit, concerning a bank in

<sup>2</sup> *Harris v. First Parish in Dorchester*, 23 Pick. (Mass.) 112; *Crease v. Babcock*, 10 Met. (Mass.) 525; *Grew v. Breed*, 10 Met. (Mass.) 569; *Harper v. Carroll*, 62 Minn. 152, 69 N. W. 610; *Pickering v. Hastings*, 56 Neb. 201, 76 N. W. 587; *Coleman v. White*, 14 Wis. 700; *Williams v. Meloy*, 97 Wis. 561, 73 N. W. 40; *Wiswell v. Starr*, 48 Me. 401; *Baker v. Atlas Bank*, 9 Met. (Mass.) 182; *Hamilton National Bank v. American Loan etc. Co.*, 66 Neb. 67, 92 N. W. 189 (1902), a receiver appointed by the court for the purpose may institute suit; *Flynn v. American Banking etc. Co.*, 104 Me. 141, 69 Atl. 771, 129 Am. St. Rep. 378, 19 L. R. A. (N. S.) 428, n. (1908); *Conway v. Owensboro Savings Bank*, 165 Fed. 822 (1908); *Adams v. Clark*, 36 Colo. 65, 85 Pac. 642 (1906).

The double liability can only be enforced and the trust fund administered by means of a suit in equity in the nature of a creditors' bill for the equal benefit of all creditors. *Conway v. Owensboro Savings Bank*, 185 Fed. 950 (1911); *Alsop v. Conway*, 188 Fed. 568 (1911). See also *Smathers v. Western Carolina Bank*, 135 N. C. 410, 47 S. E. 893 (1904); *Benedum v. First Citizens' Bank*, 72 W. Va. 124, 78 S. E. 656 (1913).

<sup>3</sup> *Slee v. Bloom*, 19 Johns. (N. Y.) 456; *Briggs v. Penniman*, 8 Cow. (N. Y.) 387; *Hirshfeld v. Bopp*, 39 App. Div. (Hun, N. Y.) 613; *Hirshfeld v. Fitzgerald*, 157 N. Y. 166, 51 N. E. 997. See *Cheney v. Scharmann*, 145 App. Div. 456 (1911), 129 N. Y. S. 993.

<sup>4</sup> *In re Hollister Bank*, 27 N. Y. 393; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. (N. Y.) 473; *Union National Bank v. Halley*, 19 S. D. 474, 104 N. W. 213 (1905).

Maine, that a bill may be maintained by some only of the billholders against some only of the shareholders, the strict rule being dispensed with by reason of the practical impossibility of getting all before the court.<sup>5</sup> The suit at law seems to be recognized as the proper, or at least as a sufficient, course in Rhode Island,<sup>6</sup> Indiana,<sup>7</sup> South Dakota<sup>7a</sup> and Georgia;<sup>8</sup> also under the National Banking Act.<sup>8a</sup> And in Illinois it is said, that where the charter of a bank makes the stockholders individually liable to the depositors, the remedy must be pursued at law, not in equity;<sup>8b</sup> and the action may be had against a single stockholder.<sup>9</sup> Though in the first two States named the language of the statute, rather than any rule of law or principle of justice, appears to be at the bottom of the decisions; and in Rhode Island the court particularly remarked that the subject was eminently proper for equity jurisdiction. The Indiana case further holds that, though the shareholders are liable "individually", still it is perfectly proper to join any number of them in one and the same suit as co-defendants. It would seem that equity must always be able to exercise jurisdiction; but further than this, the equitable jurisdiction ought to be exclusive.<sup>9a</sup> Where the proceedings are by bill in equity, it is obvious that actual personal notice often cannot be given to all the shareholders. Their names and addresses may not always be correctly discoverable from the stock-ledger. Even when the names of foreign shareholders are known, still the court may not be able to acquire such jurisdiction over them as will suffice to enforce

<sup>5</sup> *Wood v. Dimmer*, 3 Mason (C. C.) 308.

<sup>6</sup> *Atwood v. Rhode Island Agricultural Bank*, 1 R. I. 376.

<sup>7</sup> *Wright v. Field*, 7 Ind. 376.

<sup>7a</sup> *Union National Bank v. Halley*, 19 S. D. 474, 104 N. W. 213 (1905).

<sup>8</sup> *Lane v. Harris*, 16 Ga. 217; *Jones v. Wiltberger*, 42 *id.* 575.

<sup>8a</sup> *Heneke v. Twomey*, 58 Minn. 550, 60 N. W. 667.

<sup>8b</sup> In *Studebaker v. Perry*, 184 U. S. 258, 46 L. ed. 528, 22 Sup. Ct. 463 (1902), the implication is strong that if the assessment is for 100% the suit should be at law, but if for less than that amount it must be in equity.

<sup>9</sup> *Meisser v. Thompson*, 9 Ill. App. 368 (1881). See *Conway v. Owensboro Savings Bank*, 165 Fed. 822 (1908); *Union National Bank v. Halley*, 19 S. D. 474, 104 N. W. 213 (1905).

<sup>9a</sup> In Iowa an assessment in a receivership proceeding is the proper method of enforcing the double liability of stockholders. *Elson v. Wright*, 134 Iowa 634, 112 N. W. 105 (1907). See also *Childs Blethen*, 40 Wash. 340, 82 Pac. 405 (1905).

In Minnesota the enforcement may be in sequestration or insolvency proceedings. *Northwestern Trust Co. v. Bradbury*, 117 Minn. 83, 134 N. W. 513, 1913D Ann. Cas. 69.

their obligation to contribute. But by reason of the natural notoriety of such a matter among those who are so nearly interested, and by reason also of the utter impossibility of otherwise securing the ends of justice, it has been held that notice to foreign holders may be sufficiently made by publication in the public newspapers.<sup>10</sup> Each respondent will be allowed to file his separate answer and to contest the case independently of the rest.<sup>11</sup>

The individual liability of stockholders for the debts of an insolvent banking corporation, created and situated in a foreign State, may be enforced in New York by the bank's receiver, provided that no New York creditor has made claim upon the stockholders, or that the rights of any New York creditor of the bank are impaired.<sup>12</sup>

§ 694. **Extent of Liability.** — The liability of each stockholder is precisely for his ratable proportion of the sum total of that indebtedness of the bank which is to be borne by the shareholders, whether this be its entire indebtedness of every description,<sup>0</sup> or only its indebtedness upon its circulating bills and notes.<sup>0a</sup> After he has once paid this proportional amount to any person or persons having a legal right to demand it from him, he is fully acquitted and discharged. His liability is for his share of the total indebtedness, not for his proportion of each item of that indebtedness. Neither are the solvent shareholders, or those who can be come at for collection, liable to assessment beyond the proportional amount above described, by reason of the insolvency or inaccessibility of others of the shareholders. Those who are solvent and

<sup>10</sup> *In re Empire City Bank*, 18 N. Y. 199. See also *Diven v. Lee*, 36 N. Y. 302.

<sup>11</sup> *Wiswell v. Starr*, 48 Me. 401.

<sup>12</sup> *Howarth v. Angle*, 39 App. Div. (Hun, N. Y.) 151 (1899); *Marshall v. Sherman*, 84 Hun (N. Y.) 186.

<sup>0</sup> § 694. The liability extends to deposits of funds made by directors of a school district, *Black v. Special School Dist. No. 2.*, 116 Ark. 472, 173 S. W. 846 (1915); and to deposits in a bank made upon certificate of deposit which are payable upon the return of the certificates properly indorsed, *Lamar v. Taylor*, 141 Ga. 227, 80 S. E. 1085 (1914); *Wilkes v. Arthur*, 91 S. C. 163, 74 S. E. 361 (1912); and to warranties in a deed, when stockholders take over all the bank's property which exceeds its liabilities, *McLean v. Moore*, 145 S. W. 1074 (Tex. Civ. App.) (1912); and even upon some *ultra vires* contracts. See *Kipp v. Miller*, 47 Colo. 598, 108 Pac. 164, 135 Am. St. Rep. 236 (1910).

<sup>0a</sup> The liability is for debts which remain unpaid after the assets are exhausted. *Richards v. Gill*, 138 App. Div. 75 (1910), 122 N. Y. S. 620; *Buist v. Williams*, 81 S. C. 495, 62 S. E. 859 (1908). See *McClaine v. Rankin*, 197 U. S. 154, 49 L. ed. 702, 25 Sup. Ct. 410 (1905).

accessible have not the burden of paying off the whole sum which is due from all together, but only their own proportionate shares. It is the same if the bank owns shares of its own capital stock. In assessing the other shareholders, the calculation will be made upon a basis including these shares precisely as if they were held by any outside party.<sup>1</sup> Making an equation according to the time-honored rule of three, the liability of each individual may be thus ascertained: As the *whole capital stock* is to the *entire indebtedness* which all the shareholders are liable to discharge, so is the *total par value of all the shares owned by any one shareholder to his proportion of the amount to be redeemed*. The last figure gives the sum which the individual is liable to pay.

To ascertain the extent of the liability of a shareholder, S., in a suit by a bill-holder, take the whole amount, T., of bills of the bank for which the stockholders were liable; then, if S. owns one tenth of the stock of the bank, his total liability will be one tenth of T. less the amount of bills he has already paid before this suit.<sup>2</sup>

Under the constitution and statutes of California each stockholder is liable for the debts of the corporation to the full amount of his subscription to the capital stock. He is also individually liable to each creditor for such proportion of the latter's claim as the amount of stock held by such stockholder bears to the whole of the capital stock.<sup>3</sup>

Under Minnesota statutes the liability of a stockholder who has transferred his shares is limited to debts created before such transfer.<sup>4</sup>

The stockholders of an unincorporated banking association are not liable on debts of the partnership existing before they became stockholders.<sup>5</sup>

The liability of stockholders cannot be affected by the acts of the president done after the bank has gone into liquidation.<sup>6</sup>

<sup>1</sup> *In re Hollister Bank*, 27 N. Y. 393; *Hollister v. Hollister Bank*, 2 Keyes (N. Y.) 245; *Lane v. Harris*, 16 Ga. 217; *Robinson v. Bank of Darien*, 18 *id.* 65; *Robinson v. Lane*, 19 *id.* 337; *Wiswell v. Starr*, 48 Me. 401; *Atwood v. Rhode Island Agricultural Bank*, 1 R. I. 376.

<sup>2</sup> *Branch v. Baker*, 53 Ga. 502 (1874).

<sup>3</sup> *Sacramento Bank v. Pacific Bank*, 124 Cal. 147, 56 Pac. 787.

<sup>4</sup> *Harper v. Carroll*, 62 Minn. 152, 69 N. W. 610.

<sup>5</sup> *Christy v. Sill*, 131 Pa. St. 492, 19 Atl. 295, 297.

<sup>6</sup> *Schrader v. Manufacturers' Bank*, 133 U. S. 67, 33 L. ed. 564, 10 Sup. Ct. 238 (1890).

Stockholders are liable for loss of assets through the misconduct of the

If a bank goes into liquidation after it has given a note secured by all of its assets and the collateral is insufficient to meet the obligation, both assenting and non-assenting stockholders are subject to the additional liability to the extent imposed by statute.<sup>7</sup>

In Colorado the maximum liability imposed by statute is "double the amount of the par value of the stock." This is the limit of recovery by creditors, and so interest thereon cannot be collected.<sup>8</sup> Nor in Maine or Georgia can interest be collected if its payment would bring the total amount paid beyond the maximum liability fixed by statute.<sup>9</sup>

In South Dakota a stockholder is liable for the full par value of his stock above the amount invested, even though the statute says that he shall be liable "equally and ratably and not one for the other", since the statute must be construed to make it accord with the provisions of the constitution.<sup>10</sup>

An assessment of 49 per cent on stockholders of a national bank cannot be sustained while a prior assessment of 100 per cent is still in force.<sup>11</sup>

Stockholders are not liable for the attorney's fees of creditor, but stockholders are not entitled to be credited as against their liability the whole amount of the assets collected by the receiver, but only with the surplus remaining after deducting the expenses of administration including the fees for the attorney of the receiver.<sup>12</sup>

A judgment should be entered against the stockholder for the full amount of his liability and such assessments made from time to time as are found to be necessary.<sup>13</sup>

A stockholder is not entitled to any reduction of his statutory liability because he paid a premium for his stock,<sup>14</sup> or because receiver first appointed. *Flynn v. American Banking etc. Co.*, 104 Me. 141, 69 Atl. 771, 129 Am. St. Rep. 378, 19 L. R. A. (N. S.) 428, n. (1908).

The liability of stockholders cannot as against creditors or other stockholders, be released by the corporation. *Smathers v. Western Carolina Bank*, 135 N. C. 410, 47 S. E. 893 (1904).

<sup>7</sup> *Wyman v. Wallace*, 201 U. S. 230, 50 L. ed. 738, 26 Sup. Ct. 495 (1906).

<sup>8</sup> *Adams v. Clark*, 36 Colo. 65, 85 Pac. 642 (1906). See *Wedemeyer v. Hindelang*, 161 Mich. 600, 126 N. W. 708 (1910).

<sup>9</sup> *Flynn v. American Banking etc. Co.*, 104 Me. 141, 69 Atl. 771, 129 Am. St. Rep. 378, 19 L. R. A. (N. S.) 428, n. (1908); *Lamar v. Taylor*, 141 Ga. 227, 80 S. E. 1085 (1914).

<sup>10</sup> *Union National Bank v. Halley*, 19 S. D. 474, 104 N. W. 213 (1905).

<sup>11</sup> *Pepper v. Springfield Inst. for Savings*, 218 Fed. 874 (1915).

<sup>12</sup> *Buist v. Williams*, 81 S. C. 495, 62 S. E. 859 (1908).

<sup>13</sup> *Mann v. Boykin*, 79 S. C. 1, 60 S. E. 17 (1907).

<sup>14</sup> *Robertson v. Conway*, 188 Fed. 579 (1911).



he paid his full *pro rata* liability to an individual creditor,<sup>15</sup> or paid an assessment to enable the bank to continue business.<sup>15</sup>

And under a statute (Kirby's Digest § 1990) which provides that the stockholders of a bank shall be liable for all public funds that the bank on demand shall fail to pay to the persons entitled thereto, a suit properly brought to recover on behalf of the county is not abated by the payment of the funds to the county by the county treasurer who made the deposit.<sup>16</sup> Also where a shareholder relies upon a right to rescind his purchase of shares for fraud in order to escape statutory liability he must affirmatively show that the equities are in his favor.<sup>17</sup>

§ 695. **Claims bought at a Discount.** — A creditor who buys claims at a discount can only recover what he paid in a suit against a stockholder on his charter liability.<sup>1</sup> A director sued as stockholder cannot be allowed credit for the face value of claims against the bank that he has bought at a discount after its failure.<sup>2</sup>

§ 696. **Who can sue Shareholders.** — In whose favor the right of action against the shareholders exists must depend upon the nature of the collection which is to be enforced. If the demand is for further *instalments upon subscriptions* for shares of the capital stock, the *receiver or trustee*, or other legal representative of the corporation, who has succeeded to its rights, has the exclusive power to sue. For the sums thus owing are simply debts to the corporation, constituting a portion of its assets, which its representative and successor not only has the right, but is under the obligation, to collect for the purpose of discharging the indebtedness. But *if the demand is for further contribution beyond the amount of the par value* of the shares already paid or due under the original subscriptions, then it would seem that, *unless the statute expressly makes the sums thus contributed assets of the corporation, and directly gives the right of collection to the receiver<sup>0</sup> or trustee*, the *suit should properly be brought by the creditors* whose claims are to be paid out of the proceeds.<sup>a</sup> It is their sole and peculiar right

<sup>15</sup> Northwestern Trust Co. v. Bradbury, 117 Minn. 83, 134 N. W. 513, 1913D Ann. Cas. 69.

<sup>16</sup> Bank of Midland v. Harris, 114 Ark. 344, 170 S. W. 67 (1914).

<sup>17</sup> Farmers' State Bank v. Empey, 35 S. D. 107, 150 N. W. 936 (1915).

<sup>1</sup> § 695. Gauch v. Harrison, 12 Ill. App. 457 (1883).

<sup>2</sup> Holland v. Heyman, 60 Ga. 174 (1878).

<sup>0</sup> § 696. See McNeill v. Pace, 69 Fla. 349, 68 So. 177 (1915); Lamar v. Taylor, 141 Ga. 227, 80 S. E. 1085 (1914), holding that receiver may be required to compromise.

<sup>a</sup> The double liability of stockholders is a trust fund for the benefit of

which they are at liberty to enforce when they please, or altogether to forego. There seems to be no ground upon which any other person could sustain suits of this description, and hence it has been regarded as proper for the creditors themselves to bring them.<sup>1</sup> In *Maine*, however, the rule is *different*. There a receiver is allowed to sustain a bill in equity against all the shareholders to enforce contribution.<sup>1a</sup> But if he is himself a shareholder, or has been one at any previous time, so that he is himself liable to contribute, his bill will not lie, since then he would be both a complainant and a respondent.<sup>2</sup>

creditors. *Conway v. Owensboro Savings Bank*, 165 Fed. 822 (1908); *id.* 185 Fed. 950 (1911); *Flynn v. American Banking etc. Co.*, 104 Me. 141, 69 Atl. 77, 129 Am. St. Rep. 378, 19 L. R. A. (N. S.) 428, n. (1908).

<sup>1</sup> See *Lane v. Morris*, 8 Ga. 468; *Farmers' Bank v. Scott*, 144 Ky. 575, 139 S. W. 801 (1911); *Hamilton National Bank v. American L. & T. Co.*, 66 Neb. 67, 92 N. W. 189 (1902). See *Nichols v. Taunton Safe Deposit etc. Co.*, 203 Mass. 551, 89 N. E. 1035 (1909); *Union National Bank v. Halley*, 19 S. D. 474, 104 N. W. 213 (1905); *Conway v. Owensboro Savings Bank, etc. Co.*, 165 Fed. 822 (1908), holding that creditors or receivers may sue. A creditor may sue even though statute gives such right to the superintendent of banks. *Mosler Safe Co. v. Guardian Trust Co.*, 208 N. Y. 524, 101 N. E. 786, modifying 153 App. Div. 117 (1912), 138 N. Y. S. 298. See *Vantuyt v. Sullivan*, 156 N. Y. S. 309, holding that the statute is not unconstitutional. *Atwood v. Rhode Island Agricultural Bank*, 1 R. I. 376. In this case it is true that the receiver had stated in an answer filed in court that he did not deem it to be his duty to levy contributions upon the shareholders. But apparently the court was of the same opinion; at any rate it expressed no disapprobation of his views, and simply sustained the direct and immediate right of action by the stockholders without comment. *Runner, Assignee v. Dwiggin*, 147 Ind. 238, 46 N. E. 580 (1896); *Wyman v. Wallace*, 201 U. S. 230, 50 L. ed. 738, 26 Sup. Ct. 495 (1906); *Alsop v. Conway*, 188 Fed. 568 (1911).

The pendency of receivership proceedings does not affect the right of the creditors to proceed. *Western Pacific Ry. Co. v. Godfrey*, 166 Cal. 346, 136 Pac. 284, 1915B Ann. Cas. 825, n. See *Childs v. Blethen*, 40 Wash. 340, 82 Pac. 405 (1905).

If a receiver institute suit it is proper, after sustaining a demurrer to the complaint, to substitute as plaintiff one creditor for the benefit of himself and other creditors.

*Buist v. Williams*, 81 S. C. 495, 62 S. E. 859 (1908).

<sup>1a</sup> See also *Smathers v. Western Carolina Bank*, 135 N. C. 410, 47 S. E. 893 (1904), holding that the better practice is to obtain the relief sought in a creditors' bill where such has been brought; *Dill v. Ebey*, 27 Okla. 584, 112 Pac. 973 (1910).

In Vermont a receiver has the legal title to the assets of the insolvent bank and may maintain an action at law in his own name. *Fish v. Olin*, 76 Vt. 120, 56 Atl. 533 (1903).

<sup>2</sup> *Wiswell v. Starr*, 48 Me. 401; *Hewett v. Adams*, 50 *id.*, 271. But see *Flynn v. American Banking etc. Co.*, 104 Me. 141, 69 Atl. 771, 129 Am. St.

As to claims against the bank, the stockholders are as partners and cannot sue each other at law. The statute liability of stockholders is for the benefit of creditors of the bank, which last at bottom consists of the stockholders, and not for the benefit of these stockholders themselves; and they cannot by becoming creditors of the bank, and suing each other back and forth, avoid the liability to outsiders, and thus render the statute security worthless. If A. holds one thousand dollars of stock and the bank owes him one thousand dollars, and B. is another stockholder in the same position, if A. sues B. on his liability as a stockholder and B. sues A. in the same way, the statute liability of each is exhausted inside the bank and never avails the real creditors of the institution. This will not be allowed.<sup>3</sup>

The liability of the stockholders to the creditors of an insolvent banking institution constitutes part of the receiver's trust fund, which the court is authorized to direct him to enforce for the benefit of all the creditors.<sup>4</sup>

An agent chosen by the stockholders to take charge of the business of a bank in liquidation, after the debts are provided for, cannot enforce his claim against the stockholders.<sup>5</sup>

Persons buying a new issue of shares because of false statements of the directors, may, upon discovery of the fraud, recover in equity from the old shareholders, provided there is no laches in repudiating the contract.<sup>6</sup>

In the absence of statutory authority an assignee of an insolvent bank cannot sue the stockholders.<sup>7</sup>

A county treasurer is a proper party to institute suit for the

Rep. 378, 19 L. R. A. (N. S.) 428, n. (1908), which holds that neither the corporation nor the receiver can sue the stockholder, since his liability is neither to or for them, but only "for" the creditors and is no part of the corporate assets. See also *Miller v. Spaulding*, 107 Me. 264, 78 Atl. 358 (1910).

<sup>3</sup> *Meisser v. Thompson*, 9 Ill. App. 368; *Bailey v. Bunker*, 2 Hill (N. Y.) 190.

<sup>4</sup> *Watterson v. Masterson*, 15 Wash. 511, 46 Pac. 1041, citing *Wilson v. Book*, 13 Wash. 676, 43 Pac. 939; *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626 (1906); *Smathers v. Western Carolina Bank*, 135 N. C. 410, 47 S. E. 893 (1904); *Clark v. Bank of Union*, 72 W. Va. 491, 78 S. E. 785 (1913); *Benedium v. Citizens' Bank*, 72 W. Va. 124, 78 S. E. 656 (1913); *Hamilton National Bank v. American Loan etc. Co.*, 66 Neb. 67, 92 N. W. 189 (1902).

<sup>5</sup> *Church v. Ayer*, 80 Fed. 543 (1897).

<sup>6</sup> *Andriessen's Appeal*, 123 Pa. St. 303, 16 Atl. 840.

<sup>7</sup> *Farmers' Bank v. Scott*, 144 Ky. 575, 139 S. W. 801 (1911).

recovery of public funds belonging to the county even though his liability would be joint with others, since it would also be several.<sup>8</sup>

Creditors may be substituted for the commissioner of banking in an action to sequester the property and wind up the affairs of a state bank.<sup>9</sup>

§ 696 A. **How Funds should be Distributed among Creditors.**—Sums collected from stockholders in a banking corporation under their statutory liability, for the debts of the corporation, should be applied in satisfaction of claims against the corporation arising from the transaction of banking to the exclusion of other business, where the bank carried on other distinct lines of business.<sup>1</sup>

§ 697. **Lien upon Shares for Holder's Indebtedness to Bank.**—*No lien* exists at *common law* upon the shares of a shareholder who is indebted to the bank.<sup>1</sup> But it is often sought to be established, either by legislative enactment, by charter provision, or by embodiment in the articles of association or in the by-laws.<sup>1a</sup>

<sup>8</sup> Warren v. Nix, 97 Ark. 374, 135 S. W. 896 (1911). See Black v. Special School Dist. No. 2, 116 Ark., 472, 173 S. W. 846.

<sup>9</sup> Bergh v. Security Savings Bank, 122 Wis. 514, 100 N. W. 831 (1904).

<sup>1</sup> § 696 A. Kiggins v. Munday, 19 Wash. 233, 52 Pac. 855.

<sup>1</sup> § 697. In the absence of statute, contract, by-law, or usage, no lien exists. Farmers & Merchants' Bank v. Wasson, 48 Iowa 336; *In re* W. W. Mills Co., 162 Fed. 42 (1908); Union Bank v. U. S. Exchange Bank, 143 App. Div. 128 (1911), 127 N. Y. S. 661; First State Bank v. First National Bank, 145 S. W. 691 (Tex. Civ. App.) (1912). And in such case the bank may refuse to transfer stock of one who is indebted to it. Faulkner v. Topeka Bank, 72 Kan. 385, 94 Pac. 153 (1908); Madison Bank v. Price, 79 Kan. 289, 100 Pac. 280 (1909); Farmers' etc. Bank v. Cherokee Trust Co., 32 Okla. 700, 123 Pac. 153 (1912); Strahmann v. Yorkville Bank, 148 App. Div. 8 (1911), 132 N. Y. S. 130, affirmed, 210 N. Y. 536, 103 N. E. 1133.

Although the statute does not in express terms give a bank a lien upon the stock, such follows as a necessary incident of the right to make and enforce the collection of the assessment, and it follows that a bank lien is superior to that of a *bona fide* pledgee of the stock. Corbin Banking Co. v. Mitchell, 141 Ky. 172, 132 S. W. 426 (1910). But the pledgee's lien would prevail over that of the bank if the debts to the bank arose after the pledge and after the bank had notice. Curtice v. Crawford County Bank, 118 Fed. 390 (1902).

The Pub. Laws of North Carolina, 1903, p. 469, c. 275 giving a lien do not apply to a banking corporation organized under a special statute. *In re* Mills, 162 Fed. 42 (1908).

If the lien is given by statute it applies only to a valid debt and the bank cannot assert a lien on the stock of its president for an illegal loan to him, as against a prior *bona fide* pledgee. Eubank v. Bryan County State Bank, 216 Fed. 833 (1914).

<sup>1a</sup> See Curtice v. Crawford County Bank, 118 Fed. 390 (1902); Owens v. Atlanta Trust etc. Co., 119 Ga. 924, 47 S. E. 215 (1904); People's Bank

It may also exist by virtue of a usage of the particular bank; but it will be valid then only as against shareholders who have notice of it, and their assignees, who also have notice or else who take without valuable consideration.<sup>2</sup> If there is a *usage* not to allow transfer while the holder owes the bank, and a stockholder *knowing* this borrows of the bank, the lien is good against him or his assignee in insolvency.<sup>2</sup>

§ 698. **By-Law Lien.** — Any of the above methods are sufficient, with the exception of the attempt to establish it by by-laws. Concerning this, it has been held that the subject is not one which it is competent for the corporation to control by a by-law. Its importance requires more formal treatment. Such by-law, however, may be good as a contract, and will even affect third parties who have notice of it, and of the fact that the stockholder owes the bank at the time of transfer. But where a by-law provided that no transfer of stock should be made by one indebted to the bank, and that the certificates should contain notice of the provision, but in fact they did not, one who took stock without notice of the by-law or of the debt of the transferor was held to have a lien paramount to that of the bank.<sup>1</sup>

A by-law creating a lien (unless forbidden by the organic law)<sup>1a</sup> is good against the stockholder himself, or a transferee with notice.<sup>2</sup> But how far it will stand against a transferee without notice is doubtful.<sup>3</sup> On principle, it would seem that, as a corporation

*v. Macon Exchange Bank*, 116 Ga. 820, 43 S. E. 269, 94 Am. St. Rep. 144 (1902); *Brinen v. Muskegon Savings Bank*, 174 Mich. 414, 140 N. W. 529 (1913); *In re W. W. Mills Co.*, 162 Fed. 42 (1908).

<sup>2</sup> *Morgan v. Bank of North America*, 8 Serg. & R. (Pa.) 73.

<sup>1</sup> § 698. *Bank v. Pinson*, 58 Miss. 421 (1880); *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 48 S. E. 226 (1904).

<sup>1a</sup> A by-law inconsistent with statute is void. *Corydon Deposit Bank v. McClure*, 141 Ky. 481, 133 S. W. 201 (1911).

<sup>2</sup> *M'Dowell v. Bank of Wilmington*, 1 Har. (Del.) 27; *Tuttle v. Walton*, 1 Ga. 43; *Mohawk National Bank v. Schenectady Bank*, 78 Hun (N. Y.) 90.

<sup>3</sup> *Plymouth Bank v. Bank of Norfolk*, 10 Pick. (Mass.) 454; *Morgan v. Bank of North America*, 8 Serg. & R. (Pa.) 73; *M'Dowell v. Bank of Wilmington*, 1 Har. (Del.) 27; *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 48 S. E. 226 (1904).

Neither a by-law lien nor an agreement that the bank shall have a lien on the stock is binding upon a *bona fide* pledgee of the stock. *Just v. State Savings Bank*, 132 Mich. 600, 94 N. W. 200 (1903).

A by-law of a bank which prohibits the sale of stock by a stockholder while indebted to the bank is made for the benefit of the corporation, and its provisions do not apply to a *bona fide* purchaser of stock in good faith at a pledgee's sale, especially when the bank has actual knowledge

cannot deprive a stockholder of his common law property rights without either his consent or power given in the charter, such a by-law lien (unauthorized) could be good only as a contract; that a stockholder borrowing of the bank after knowing the by-law impliedly consents to it as one of the conditions the bank has announced as the basis upon which it will loan to stockholders, and when the stockholder is himself thus held, his transferee with notice can have no better right; but a transferee without actual notice, since stock is held to be negotiable, cannot be affected, unless the by-law is constructive notice and puts him on inquiry. In the interests of justice and fair dealing it might be well that third persons should be held bound by what the by-laws would reveal in regard to matters which evidently may be affected by them either as by-laws or as contracts, though authority as to the matter of notice to strangers by by-laws is rather against this view; but if the transferee has no notice of the existence of any debt from the stockholder to which the lien could apply, then on the principles of negotiability the vendee would hold against any mere contract, and the lien would have to derive its force from statute law in order to affect him.

§ 698 A. **Provision for a Lien in the Articles of Association.**

— The associates have the power to include such a provision in their articles of association,<sup>0</sup> but it is not to be assumed that what they can thus dispose of they can by the same articles determine to dispose of in by-laws or through the action of the directorial board. The same rule, which was first laid down concerning corporations established under the New York State law, has since in the same State been extended to corporations organized under the National Banking Act of 1864.<sup>1</sup> But a contrary doctrine has been asserted by the Supreme Court of the

of the pledge which was made when there was no statutory lien on the stock and the indebtedness on which the bank claims a lien was created after the stock was pledged. *Ardmore State Bank v. Mason*, 30 Okla. 586, 120 Pac. 1080 (1911).

<sup>0</sup> § 698 A. *Lyman v. State Bank*, 81 App. Div. 367 (1903), 80 N. Y. S. 901, affirmed in 179 N. Y. 577, 72 N. E. 1145 (1904).

<sup>1</sup> *Bank of Attica v. Manufacturers & Traders' Bank*, 20 N. Y. 501; *Leggett v. Bank of Sing Sing*, 24 *id.* 283; *Arnold v. Suffolk Bank*, 27 Barb. (N. Y.) 424; *Rosenback v. Salt Springs National Bank*, 53 *id.* 495; *Conklin v. Second National Bank*, *id.* 512. But *semble* that, if the articles of association provide that such a lien may be established, a by-law, made in pursuance of such articles and establishing the lien, would be valid. *Rosenback v. Salt Springs National Bank*, *supra*.

United States, and in divers of the State courts, concerning the national banks.<sup>2</sup> And the latter is clearly correct. Such a lien would be inconsistent with the manifest intent of the National Banking Act, in prohibiting national banks from loaning on the security of their own stock. (II. §§ 35, 235.)

§ 699. **Transfer in Derogation of Lien.** — (a) An attempt to make a transfer in derogation of a valid lien of this nature is of no effect as against the bank.<sup>0</sup> The lien is not impaired, and the transfer can be good only as between the parties, until such time as the indebtedness is discharged. In the mean time the strict, and doubtless the correct rule, would permit, and might oblige, the bank to recognize only the transferrer as the holder of the shares.<sup>1</sup> For he has had no right as towards the bank to divest himself of the ownership, and it might be dangerous for the bank itself if it should lay itself open to the charge of having ratified the transfer and waived its lien by recognizing the transferee as the owner. If it should so recognize him for any especial purpose, care should at least be taken expressly to reserve the lien.

(b) In England an organic act gave to the corporation a lien on shares for indebtedness of the holder to the corporation, and the certificates of stock recited this fact. A holder transferred his certificates to his banker as collateral security. It was held that the corporation could enforce its lien on the shares, even to cover indebtedness of the shareholder which had accrued after the corporation had received notice of the pledge of the certificates to the banker.<sup>2</sup>

### *Transfer only on Books*

(c) It is a general, perhaps it may be considered a universal rule, with banks which claim the right to enforce a lien of this nature, that no transfer of shares can be made which shall be valid as towards the corporation itself save upon the corporate books. Such rules, duly established by legislative or directorial action, will be sustained by the courts, and no transfer of any other description which the parties may make between themselves

<sup>2</sup> See *post*, in the part on the National Banking Act.

<sup>0</sup> § 699. In the absence of statute it is not competent for a bank to restrict the transfer of its stock by a stockholder who is indebted to it. *Strahmann v. Yorkville Bank*, 148 App. Div. 8 (1911), 132 N. Y. S. 130.

<sup>1</sup> *Bank of Utica v. Smalley*, 2 Cow. (N. Y.) 770.

<sup>2</sup> *Bradford Banking Co. v. Briggs*, 31 Ch. D. 19.

will bind the bank. The assignee in any such contract will take only an equitable right to the shares, incumbered with all the liens which had become fastened upon them in the hands of the assignor. This is the case equally whether the assignee had or had not notice, at the time of the transaction, of the rights or the claims of the bank.<sup>3</sup>

*No Lien for Debt of Assignor Created Subsequent to Notice of Assignment*

(d) But it has been declared that the bank is bound to give effect to an equitable assignment of which it has notice to this extent: that it can no longer regard the shares as security for any subsequently created indebtedness of the assignor. They are available only upon his debts which have already arisen.<sup>3a</sup> But for debts of the assignee the bank may thereafter enforce a lien which will be perfectly valid, though the transfer has not been made, and which will only be secondary to the lien for the assignor's debts.<sup>4</sup> But it must be confessed that this rule, which has only been enunciated in one Western court, does not seem wholly satisfactory. Another ruling, which, though somewhat similar, yet avoids the unsatisfactory element in the preceding case, and is certainly less open to criticism, asserts that, if the bank has notice that the shares are held only in trust by the nominal owner, it can thereafter hold them to secure the indebtedness of the *cestui*, and of him alone.<sup>5</sup>

*Lien on Dividends*

(e) But the bank has a lien upon dividends, or more properly it may set off dividends accruing upon the shares of a stockholder

<sup>3</sup> *Union Bank v. Laird*, 2 Wheat. 390, 4 L. ed. 269; *Farmers' Bank v. Inglehart*, 6 Gill (Md.) 50; *Brent v. Bank of Washington*, 10 Pet. 616, 9 L. ed. 555; *Reese v. Bank of Commerce*, 14 Md. 271; *Klopp v. Lebanon Bank*, 46 Pa. St. 88; *People's Bank v. Exchange Bank*, 116 Ga. 820, 43 S. E. 269, 94 Am. St. Rep. 144 (1902). See *Corbin Banking Co. v. Mitchell*, 141 Ky. 172, 132 S. W. 426, 31 L. R. A. (N. S.) 446 (1910).

<sup>3a</sup> *Nicollet National Bank v. City Bank*, 38 Minn. 85, 35 N. W. 577; *Ardmore State Bank v. Mason*, 30 Okla. 568, 120 Pac. 1080, 39 L. R. A. (N. S.) 292, n. (1911); *Pueblo Savings Bank v. Richardson*, 39 Colo. 319, 89 Pac. 799 (1907); *People's Bank v. Exchange Bank*, 116 Ga. 820, 43 S. E. 269, 49 Am. St. Rep. 144 (1902).

<sup>4</sup> *Conant v. Seneca County Bank*, 1 Ohio St. 298. See *Just v. State Savings Bank*, 132 Mich. 600, 94 N. W. 200 (1903).

<sup>5</sup> *Mechanics' Bank of Alexandria v. Seton*, 1 Pet. 299, 7 L. ed. 152.



against indebtedness of the stockholder to the bank. For the dividend is a simple debt owing from the corporation to the shareholder.<sup>6</sup>

§ 700. **Bank Postponed as to the Debtor's other Property.** — When a bank has applied the whole proceeds of stock to payment of the holder's debt, it is postponed as to his other property until his other creditors have been made equal out of the general estate, and then the residue will be distributed *pro rata* among all the creditors. A charter lien is only entitled to a preference similar to that allowed to partnership over individual creditors.<sup>1</sup>

§ 701. **Waiver and Loss of Lien.**<sup>0</sup> — *If the bank suffers the transfer to be made upon its books without the express stipulation that the shares shall still be held by the assignee subject to the lien for the then subsisting indebtedness of the assignor, it will amount to a waiver of the lien.*<sup>1</sup> Even though the Pennsylvania bank law of 1850, § 10, forbids a stockholder to transfer on the books of the bank so long as he is indebted to the bank,<sup>1a</sup> yet the bank may waive the right<sup>2</sup> by the act of an officer impliedly authorized to make the transfer, and the assignee will then obtain complete title. But where the act is less direct and unquestionable, the presumption must always be that no waiver was intended. The president and directors may be admitted to testify that they never designed to waive. Where the certificate of shares states that they are transferable at the bank, or only at the bank, both expressions being of the same force,<sup>3</sup> personally or by attorney, on the surrender of the certificate, there is nothing in this language which intimates a waiver or abandonment of lien, or of the right to refuse a transfer so long as the person to whom this certificate

<sup>6</sup> *Hagar v. Union Bank*, 63 Me. 509.

<sup>1</sup> § 700. *German Security Bank v. Jefferson*, 10 Bush (Ky.) 326 (1874).

<sup>0</sup> § 701. The lien becomes discharged when the debt of the stockholder is paid. *Ardmore State Bank v. Mason*, 30 Okla. 568, 120 Pac. 1080, 39 L. R. A. (N. S.) 292, n. (1911).

<sup>1</sup> *Sewall v. Lancaster Bank*, 17 Serg. & R. (Pa.) 285; *Rogers v. Huntingdon Bank*, 12 *id.*, 77.

<sup>1a</sup> The Pennsylvania Act of 1895 favors the sale and transfer of stock and avoids anything tending to hamper such transactions. *Bank of Millvale v. Ohio Valley Bank*, 234 Pa. St. 1, 82 Atl. 1115 (1912).

<sup>2</sup> *Cecil National Bank v. Watsonstown Bank*, 105 U. S. 217, 26 L. ed. 1039 (1881); *Farmers' etc. Bank v. Cherokee Trust Co.*, 32 Okla. 700, 123 Pac. 153 (1912).

<sup>3</sup> *Williams v. Mechanics' Bank*, 5 Blatchf. (C. C.) 59.

was issued remains indebted to the bank.<sup>4</sup> If there is any indorser or guarantor for the shareholder's indebtedness, the bank may at any time demand and receive further security from him without in any way infringing or affecting its right of lien.<sup>5</sup> A statute requiring that holders of stocks desiring to sell shall give ten days' notice to the bank to purchase or find a purchaser, and at the expiration of that time that the holders may sell at pleasure, is not construed as a waiver by the bank of any lien on the stock.<sup>5a</sup> A statutory prohibition, forbidding the bank to loan on the security of its own stock, only forbids it to take such shares directly in pledge, and is not intended to affect the general statutory lien and loans which may be made in reliance thereon.<sup>6</sup> The lien is appurtenant to the indebtedness, and not to the remedy. Whence it follows that, though the right of action at law may have been barred, and the remedy lost by the running of the Statute of Limitations, still, the indebtedness not being thereby discharged, the lien subsists. The two are coexistent.<sup>7</sup>

A claim by a bank of a general lien on a debtor's securities for a balance due by the debtor is not inconsistent with the claim of a lien thereon by special contract.<sup>8</sup>

When the cashier of a bank represents to A. that the bank has no lien on certain stock, and A., believing the statement to be true, acts upon it to his damage, the bank is estopped from claiming priority of lien under the Michigan statutes.<sup>9</sup>

Where a bank sells stock at sheriff's sale, the purchaser takes such shares free from any liability to the bank of the previous shareholder.<sup>10</sup>

If the certificate of stock contains no reference to the bank's articles of association by virtue of which a bank has a lien on its stock, and has nothing upon its face to indicate that the right to sell or assign was subject to restrictions or limitations, and the transferee of the stock for value had no knowledge of any such lien, the bank is estopped to assert it.<sup>11</sup>

<sup>4</sup> *Union Bank v. Laird*, 2 Wheat. 390, 4 L. ed. 269; *Hill v. Pine River Bank*, 45 N. H. 300; *Reese v. Bank of Commerce*, 14 Md. 271.

<sup>5</sup> *Union Bank v. Laird*, 2 Wheat. 390, 4 L. ed. 269. See § 704.

<sup>5a</sup> *Citizens' Bank v. Kalamazoo Co. Bank*, 111 Mich. 313, 69 N. W. 663.

<sup>6</sup> *Vansands v. Middlesex County Bank*, 26 Conn. 144.

<sup>7</sup> *Farmers' Bank v. Inglehart*, 6 Gill (Md.) 50.

<sup>8</sup> *Cockrill v. Joyce*, 62 Ark. 216, 35 S. W. 221.

<sup>9</sup> *Oakland Co. Savings Bank v. State Bank*, 113 Mich. 284, 71 N. W. 453.

<sup>10</sup> *Richardson v. Wallace*, 39 S. C. 231, 17 S. E. 725.

<sup>11</sup> *Lyman v. State Bank*, 81 App. Div. 367 (1903), 80 N. Y. S. 901.

When a holder of stock pledges them with the knowledge of the bank at a time when he owes the bank nothing, the bank cannot claim a lien on the stock for its subsequent indebtedness to it in priority to the pledgee or his assigns, even though the sale was private and not in accordance with statutory requirements of notice and sale at public auction.<sup>12</sup>

§ 702. **For what Indebtedness the Lien attaches.** — *Immature Debt.* — The nature of the indebtedness, whence or how arising, is a matter of no consequence as regards the attaching of the lien.<sup>1</sup> But whether the lien will attach to secure indebtedness which has not actually matured at the time when a demand for transfer is made, is a question concerning which the courts are not all agreed, though a decided preponderance is observable. In Maryland it has been decided in the negative.<sup>2</sup> But the current of authority seems to tend the other way.<sup>3</sup> Certainly it seems reasonable that the lien should secure indebtedness which has not fully matured; otherwise, a large portion of the good which is sought to be accomplished by it must be wholly annulled. The bank, knowing itself to be entitled to such a lien, may fairly be supposed to rely upon it in allowing the indebtedness to be assumed originally, and would be justified in regarding it as a valuable contribution towards perfect security, on the faith of which the directors may not improperly neglect to demand such strong additional safeguards as they are wont. Further, if the lien does not apply to immature indebtedness, what is to prevent the grossest frauds by the debtor? He cannot be legally opposed, if, with the express purpose of stripping the bank of all possible means of repaying itself, and knowing that he will not and cannot himself pay it, he transfers all his shares upon the very day before his note to the bank is to fall due. Such rulings as that of the Maryland bench obviously

<sup>12</sup> *Ardmore State Bank v. Mason*, 30 Okla. 568, 120 Pac. 1080, 39 L. R. A. (N. S.) 292, n. (1911).

<sup>1</sup> § 702. *Rogers v. Huntingdon Bank*, 12 Serg. & R. (Pa.) 77; *Mechanics' Bank v. Earp*, 4 Rawle (Pa.), 384.

The lien extends to an assessment to make good an impairment of capital. *Corbin Banking Co. v. Mitchell*, 141 Ky. 172, 132 S. W. 426, 31 L. R. A. (N. S.) 446 (1910). But it does not extend to the indebtedness of the assignee of the stock. *Curtice v. Crawford County Bank*, 118 Fed. 390 (1902).

<sup>2</sup> *Reese v. Bank of Commerce*, 14 Md. 271.

<sup>3</sup> *Leggett v. Bank of Sing Sing*, 24 N. Y. 284; *Grant v. Mechanics' Bank of Philadelphia*, 15 Serg. & R. (Pa.) 140; *Sewall v. Lancaster Bank*, 17 *id.*, 285; *Michigan Trust Co. v. State Bank*, 111 Mich. 306, 69 N. W. 645.

operate only to impugn the wisdom of granting any such lien at all, by robbing it of nearly all its value.

In North Carolina a statutory lien of a bank on stock for debts due from the stockholder applies only to a direct indebtedness which the stockholder creates with the corporation, and not to notes to a third person subsequently acquired by the bank.<sup>4</sup>

And in Texas a national bank has no lien upon the stock owned by customer indebted to it for loans or advances.<sup>5</sup>

§ 703. **Subrogation of Surety to Bank's Lien.** — The lien is primarily for the benefit of the bank.<sup>6</sup> But if the principal debtor furnishes sureties or guarantors upon the debt, and they pay the amount to the bank, they will then be subrogated to all the rights of the bank. They will be entitled to avail themselves of the lien, and the bank will owe to them the duty of refusing to allow a transfer of the shares, and must not suffer a waiver or loss of the security by any other means, until they have been reimbursed. After payment by them, the bank in fact becomes a trustee for them, for the purpose of doing whatever may be necessary to retain and secure the lien for their benefit.<sup>1</sup> The rule that the surety is entitled to the benefit of all the creditor's securities has been carried so far in respect to liens upon bank shares, that it has been held that the bank has no right to appropriate or shift the lien for the purpose of covering a new demand, with the effect of leaving the debt on which the surety is liable either unsecured or imperfectly secured.<sup>2</sup>

(a) **Lien on Shares of a Partner.** — The lien will attach upon bank shares, which are the private and separate property of one of the partners in a firm, to secure a debt due from the firm.<sup>3</sup>

§ 704. **Cancellation of the Lien by other Security.** (See § 701.) — It does not prevent the lien from attaching, or the bank from refusing to permit a transfer, that the deposit account of the debtor is greater than the amount of his indebtedness. The bank is under no obligation to look to the deposit account before or in preference to the stock. But it seems that if the shareholder

<sup>4</sup> *Boyd v. Redd*, 120 N. C. 335, 27 S. E. 35.

<sup>5</sup> *Goodbar v. National Bank*, 78 Tex. 461, 14 S. W. 851.

<sup>6</sup> § 703. *People's Bank v. Exchange Bank*, 116 Ga. 820, 43 S. E. 269, 94 Am. St. Rep. 144 (1902).

<sup>1</sup> *Klopp v. Lebanon Bank*, 46 Pa. St. 88.

<sup>2</sup> *Kuhns v. Westmoreland Bank*, 2 Watts (Pa.) 136.

<sup>3</sup> *Mechanics' Bank v. Earp*, 4 Rawle (Pa.) 384; *Citizens' Bank v. Kalamazoo Co. Bank*, 111 Mich. 313, 69 N. W. 663.

offers ample security for the debt, and the bank still refuses with unreasonable strictness to permit the transfer, the shareholder will then have a right of action against the bank for the refusal.<sup>1</sup> This is intimated in the cited case; but it was, strictly, an *obiter dictum*, and there seems to be some reason for doubting by what right the courts could compel the bank to exchange, or punish it for refusing to exchange, a security of a peculiar nature, which the law has either directly given to it, or has allowed it by its own action to secure, and to take in its stead another species of security, which, though it may appear equally valuable and sufficient, may yet for divers reasons be less acceptable to the directors. But if the bank assents to accept other security, the lien will be thereby discharged, unless the contrary understanding be affirmatively proved.<sup>2</sup>

§ 705. **The Lien Affects the Shares as a Whole.** — Though the value of the shares may far exceed the amount of the debt, still the debtor is not entitled to demand an apportionment. The lien affects them as a whole, and not only what may appear to be, or may really be, a sufficient part of them. The bank is therefore entitled to refuse any transfer whatsoever, without regard to comparative values or amounts.<sup>1</sup>

§ 706. **Shareholder's Right to Surplus Assets.**<sup>0</sup> — Any surplus which may remain, after the payment of all corporate debts, in the hands of the assignee, trustee, receiver, or other person who has had the corporate property committed to his charge for the purpose of winding up its affairs, belongs to the shareholders.<sup>a</sup> They

<sup>1</sup> § 704. *Mechanics' Bank v. Earp*, 4 Rawle (Pa.) 384.

<sup>2</sup> *M'Lean v. Lafayette Bank*, 3 McLean 587.

<sup>1</sup> § 705. *Sewell v. Lancaster Bank*, 17 Serg. & R. (Pa.) 285.

<sup>0</sup> § 706. The accumulated earnings or surplus fund of a corporation constitute a part of its assets and belong to the corporation and not to the stockholders, until they have been declared and set apart as dividends. *Bryan v. Sturgis National Bank*, 40 Tex. Civ. App. 307, 90 S. W. 704 (1905).

The surplus and undivided profits are no part of the income of bank stocks. It consists only of declared dividends. *Tubb v. Fowler*, 118 Tenn. 325, 99 S. W. 988 (1906).

<sup>a</sup> Such is true even though a part of the surplus consists of money given to the bank by its directors for the purpose of preventing the liquidation of the bank. *Wright v. Gurley*, 133 La. 745, 63 So. 310 (1913).

Nor can trustees of a dissolved bank who have paid dividends through an honest mistake as to existing claims recover the amount so paid when they have not exhausted the assets of the corporation, such as collecting from a cashier for his negligence. *Daugherty v. Poundstone*, 120 Mo. App. 300, 96 S. W. 728 (1906).

are entitled to have it apportioned among them according to the number of their respective shares. The trust is first for the discharge of the indebtedness of the bank,<sup>b</sup> and next for a division of the remaining assets among the corporators. For this reason, and also because of the number of persons interested, a bill in equity may properly be brought against the trustee demanding that he account and that he collect and distribute the surplus property. Though if it should happen that an apportionment has already been made, and that only payment in accordance with it is sought, then each individual shareholder might maintain his own action at law for the collection of the sum due to him, like any other action for simple debt.<sup>1</sup> But the ownership of shares, or the payment of a contributory share under the apportionment for the payment for corporate debts, does not render the shareholder a creditor of the corporation, or entitled to any dividend out of its assets till all the proper indebtedness has been discharged in full.<sup>2</sup> Not even if the shareholders have been assessed upon the basis of an undervaluation of the corporate assets can they have any dividend returned to them so long as there are creditors of the corporation remaining unpaid.<sup>3</sup>

§ 706 A. **Shareholder's Right to Assets upon Reduction of Capital Stock.** — When the capital stock of a bank is legally reduced, a distribution of the assets of the bank among the stockholders in a sum equal to the difference between the original and the reduced amount of capital is not authorized. But distribution must be so limited as to leave with the bank assets equal in value to the par value of its capital stock, as reduced, after its liabilities are discharged.<sup>1</sup>

§ 707. **Shareholder's Right to New Shares.** — Where there is an increase of the original amount of the capital stock of the bank, and new shares are created to represent it, those who are shareholders at the time of the creation have the first right to subscribe, in the proportion of their original shares, for the new ones,

<sup>b</sup> The indebtedness includes interest on the accounts of depositors. *People v. Merchants' Trust Co.*, 116 App. Div. 41 (1906), 101 N. Y. S. 255.

<sup>1</sup> *Bacon v. Robertson*, 18 How. 480, 15 L. ed. 499; *Smith v. Snow*, 3 Mad. (C. C.) 10; *Wedemeyer v. Hindelang*, 161 Mich. 600, 126 N. W. 708 (1910).

<sup>2</sup> *Hollister v. Hollister Bank*, 2 Keyes (N. Y.) 245; *Coulter v. Robertson*, 24 Miss. 278.

<sup>3</sup> *Pruyn v. Van Allen*, 39 Barb. (N. Y.) 354.

<sup>1</sup> § 706 A. *Kassler v. Kyle*, 28 Colo. 374, 65 Pac. 34 (1901).

before these can be offered generally.<sup>1</sup> Nor can they be deprived of this right by the board of directors; but if they be deprived of the privilege by the action of the board, they or any of them may sue the corporation by special count in assumpsit, and recover, by way of damages, any premium the shares might be worth above par.<sup>2</sup> But where the full amount of the original capital stock has never been subscribed for, and the full number of shares thereof has never been issued, the case is different. If the directors then see fit to accept or solicit subscriptions for the shares remaining untaken, they are not obliged to give to those who are already shareholders any preference, but may offer the fresh shares in open market.<sup>3</sup>

§ 708. **Shareholder's Rights in Dividends.** — Dividends are only payable to the shareholder on demand; and accordingly he has no right of action against the bank to recover them until after demand has been made for them, and made for them at a time when the shareholder has a right to have them paid.<sup>4</sup> If he make the demand when the bank is rightfully retaining the dividend in set-off against his indebtedness to the bank, he cannot bring suit, after this indebtedness has been paid, without renewing the demand.<sup>1</sup>

When a dividend has been declared it is held in trust for the stockholders, and may be transferred either with or without a transfer of the stock.<sup>10</sup>

A resolution of the directors of a bank that a dividend declared shall be entered as a credit on any debt of a shareholder to the bank, "whose indebtedness is not fully secured", does not authorize the bank to retain a dividend for an indebtedness of the stockholder, already secured.<sup>1a</sup>

<sup>1</sup> § 707. *Gray v. Portland Bank*, 3 Mass. 364.

<sup>2</sup> *Eidman v. Bowman*, 58 Ill. 444. <sup>3</sup> *Curry v. Scott*, 54 Pa. St. 270.

<sup>4</sup> § 708. A member of a savings bank society has no right to have the directors declare a dividend out of the reserve in excess of the minimum amount required by statute, when the directors retain a much larger amount than the statute requires. *Mulcahy v. Hibernia Savings etc. Society*, 144 Cal. 219, 77 Pac. 910 (1903).

Declaration of dividends rests in the discretion of the directors, and, in the absence of fraud, will not be controlled by the courts. *Bryan v. Sturgis National Bank*, 40 Tex. Civ. App. 307, 90 S. W. 704 (1905).

<sup>1</sup> *Hagar v. Union Bank*, 63 Me. 509; *Bank of Louisville v. Gray*, 84 Ky. 575, 2 S. W. 168.

<sup>10</sup> *Redhead v. Iowa National Bank*, 127 Iowa 572, 103 N. W. 796 (1905); *Cogswell v. Second National Bank*, 78 Conn. 75, 60 Atl. 1059 (1905), affirmed, 204 U. S. 1, 51 L. ed. 343, 27 Sup. Ct. 241.

<sup>1a</sup> *Solomon v. Bank*, 72 Miss. 858, 17 So. 383.

A dividend paid to a stockholder when neither he nor the officers knew the bank was insolvent, cannot be recovered by the assignee. Their mere position as stockholders and officers does not charge them with knowledge, and if the transaction is *bona fide*, it will stand.<sup>2</sup>

But where a dividend is unlawfully paid the bank may recover, subject, however, to the Statute of Limitations, which begins to run at the time the dividend is paid.<sup>3</sup>

A stockholder in a bank is not entitled to interest from the bank either on ordinary dividends declared on his shares, or on money due him from a reduction by the bank of its capital stock, for a period during which the bank was prevented from paying the dividends because of attachments by third persons on the shareholder's stock. This was true even where the money thus due the stockholder was, during the attachment, mingled with the general assets of the bank; the bank being ready and willing to pay except for the attachment, and having on hand a sufficient balance therefor.<sup>4</sup>

§ 708 A. **Shareholder's Right to Inspect Books, Records, and Documents.** — The decisive weight of American authority recognizes the common law right of a shareholder for proper purposes and under proper regulations in regard to place and time to inspect the books, records, and documents of the bank. But a writ of mandamus to compel inspection should not be granted for speculative purposes or to gratify idle curiosity or to aid a black-mailer. However, the possibility that the stockholder may make an improper use of the information obtained and so abuse his right of inspection is not a sufficient justification for refusing the right.<sup>1</sup> State courts have jurisdiction to compel officers of a national bank to permit a stockholder to examine its records and documents for a proper purpose.<sup>2</sup>

<sup>2</sup> *McLean v. Eastman*, 21 Hun (N. Y.) 312. See *Corn v. Skillern*, 75 Ark. 148, 87 S. W. 142 (1905), where the officer knew of the insolvency but the stockholder did not.

<sup>3</sup> *Hayden v. Thompson*, 71 Fed. 60; *Corn v. Skillern*, 75 Ark. 148, 87 S. W. 142 (1905).

<sup>4</sup> *Mustard v. Union National Bank*, 86 Me. 177, 29 Atl. 977.

<sup>1</sup> § 708 A. *Guthrie v. Harkness*, 199 U. S. 148, 50 L. ed. 130, 19 Sup. Ct. 513 (1905), affirming 27 Utah 248, 75 Pac. 624, 107 Am. St. Rep. 664; *Woodworth v. Old Second National Bank*, 154 Mich. 459, 117 N. W. 893 (1908); *Lorge v. Consolidated National Bank*, 105 App. Div. 409 (1905), 94 N. Y. S. 1159; *In re Taylor*, 117 App. Div. 348 (1907), 101 N. Y. S. 1039; *Robertson v. Owensboro Sav. Bank*, 150 Ky. 50, 149 S. W. 1144 (1912).

<sup>2</sup> *Woodworth v. Old Second National Bank*, *supra*; *In re Taylor*, *supra*.



§ 709. **Transfer and Certificates.** — Every person who becomes the owner<sup>0</sup> of shares is entitled to demand that the bank shall permit the necessary formalities accompanying and requisite to the completion of a transfer to be performed on its books, and that it shall issue to him a certificate for the shares, such being the ordinary usage of business in this respect.<sup>1</sup> An action will lie for a wrongful refusal to comply with these obligations.<sup>2</sup> Where a by-law declares that shares are transferable by the holder in person or by attorney only on surrender of the certificate, a purchaser of the shares bringing with him the certificate and a proper power of attorney is entitled to have the shares transferred to him. If the bank refuses so to do, the purchaser may have his action for damages for the value of the shares, and this although the

<sup>0</sup> § 709. See *Eubank v. Bryan County State Bank*, 216 Fed. 833 (1914), a good faith purchaser may be an owner even though the certificates may not be transferred as required by a by-law. See also *Hudspeth v. Denton*, 82 N. J. Eq. 281, 91 Atl. 741 (1912), affirmed in 82 N. J. Eq. 363, 91 Atl. 753, where a transfer of stock did not amount to a sale but only to a mutual exchange of securities.

<sup>1</sup> *Hussey v. Manufacturers' Bank*, 10 Pick. (Mass.) 415; *Madison Bank v. Price*, 79 Kan. 289, 98 Pac. 222 (1909); *Farmers' etc. Bank v. Cherokee Trust Co.*, 32 Okla. 700, 123 Pac. 153 (1912); *Eubank v. Bryan County State Bank*, 216 Fed. 833 (1914).

The fact that the shares have been purchased at a private sale rather than at a public sale after notice is no defense when such notice and sale have been waived by the pledgor for whose benefit it exists. *Ardmore State Bank v. Mason*, 30 Okla. 568, 120 Pac. 1080 (1911); *White River Savings Bank v. Capital Savings Bank*, 77 Vt. 123, 59 Atl. 197, 107 Am. St. Rep. 754 (1904); *Porter v. Marine Savings Bank*, 186 Mich. 355, 153 N. W. 19 (1915), right in equity to compel transfer. See *Johnson v. Hume*, 138 Ala. 564, 36 So. 421 (1903).

And a by-law of a national bank necessitating the production of an old certificate of stock before a new one is issued to take its place will not impair the authority of the Chancellor to order the bank to issue a new certificate. *Letcher v. German National Bank*, 134 Ky. 24, 119 S. W. 236 (1909).

<sup>2</sup> *Morgan v. Bank of North America*, 8 Serg. & R. (Pa.) 73; *Madison Bank v. Price*, 79 Kan. 289, 100 Pac. 280 (1909); *Ardmore State Bank v. Mason*, 30 Okla. 586, 120 Pac. 1080 (1911); *Ohio Valley Banking etc. Co. v. Wathen*, 166 Ky. 274, 179 S. W. 230 (1915).

The fact that the directors withhold assent to the transfer of stock to a purchaser and thus prevent him from reselling the stock before the insolvency of the bank is not in itself evidence of fraud. *Penfold Charlevoix Sav. Bank*, 140 Mich. 126, 103 N. W. 572 (1905).

*Delivery of Certificates.* Where a stock certificate of a bank is left in its custody by the owner, it is the bank's duty to deliver it within a reasonable time after demand, and upon a failure to do so the bank is liable for any damages thereby resulting to the owner or his representatives. *Ohio Valley Banking etc. Co. v. Wathen*, *supra*.

bank has improperly transferred the shares to some other claimant.<sup>3</sup> Though if the bank has any lien upon the shares, or if the party himself or the seller of the shares fails to conform to the requisite and reasonable formalities established by the bank in the matter of transfers, the bank will be entitled to refuse to act until the obstacle is removed.<sup>3a</sup> Statutory provisions declaring the shares to be transferable at the bank, or that the transfer shall be registered on the books of the bank, are designed for the protection of the bank, and will be so construed as to secure that protection. The transfer will not be considered as having been made "at the bank" simply because the parties have passed and received the certificate within the walls of the banking-house. The act must be so done as "to assume a formal and authentic shape, under the official cognizance of the officers of the institution." The regulations of the corporation in the premises, unless unreasonable, must be complied with.<sup>4</sup>

§ 710. **Statutes requiring Transfers to be on the Books.** — Some of the State statutes requiring registry of the transfer of shares follow the exact language of the laws relating to registry of deeds, and declare that no unrecorded title shall be good; or only as against those having actual notice. In California even this sort of law is held not to avail creditors.<sup>1</sup> But in Maine it does,<sup>2</sup> and

<sup>3</sup> *Bank v. Lanier*, 11 Wall. 369, 20 L. ed. 172; and see *Bridgeport Bank v. New York & New Haven R. R. Co.*, 30 Conn. 231; *New York & New Haven R. R. Co. v. Schuyler*, 34 N. Y. 30; *Ardmore State Bank v. Mason*, 30 Okla. 586, 120 Pac. 1080 (1911).

<sup>3a</sup> If a statute forbids a transfer of shares without the consent of the board of directors when the registered holder is indebted to the bank, a transfer under such circumstances may be refused, even though the one demanding the transfer acquired the shares from the registered holder when such holder was not indebted to the bank. *Faulkner v. Bank of Topeka*, 77 Kan. 385, 94 Pac. 153 (1908).

When the assignee of the stock is not willing to pay the amount necessary to discharge the lien he has no right to demand a transfer on the books of the bank until the assignor's indebtedness contracted before that time has been fully paid. *People's Bank v. Exchange Bank*, 116 Ga. 820, 43 S. E. 269, 94 Am. St. Rep. 144 (1902).

If the lien is a by-law lien and has not come to the attention of an innocent pledgee he will be protected. *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 48 S. E. 226 (1904). See also *First State Bank v. First National Bank*, 145 S. W. 691 (Tex. Civ. App.) (1912).

<sup>4</sup> *Williams v. Mechanics' Bank*, 5 Blatchf. (C. C.) 59.

The requirements of by-laws may be waived. *People's Home Sav. Bank v. Rickard*, 139 Cal. 285, 73 Pac. 858 (1903).

<sup>1</sup> § 710. *Winter v. Belmont*, 53 Cal. 428.

<sup>2</sup> *Skowhegan Bank v. Cutler*, 49 Me. 315.

also in Massachusetts.<sup>3</sup> In another Massachusetts case,<sup>4</sup> where the charter provided that transfers could only be made at the bank and on its books, the court held that an attaching creditor could hold against a previous unrecorded transfer for value, and this was followed in Illinois.<sup>5</sup>

(a) But where there was a by-law providing that a transfer could only be made upon the books of the bank and upon return of the certificate, the transferee was held to have a better right than a subsequently attaching creditor.<sup>6</sup> Neither had effected a legal transfer, and the transferee had the prior equity. Moreover, by-laws are not intended for the benefit of creditors, but for the benefit of the bank and for its internal management.

A transfer of stock by delivery, without evidence of a by-law authorizing such transfer, will not entitle the transferee to the rights of a stockholder.<sup>7</sup>

§ 711. **Transfer only at the Bank and on Surrender of Certificate.** — Where the certificate said “transferable only at the bank, and only on surrender of this certificate”, and A. transferred his shares to B., giving him a power of attorney and the certificate, and the bank allowed A. to transfer to C. on the bank books without delivery of the certificate, B. sued the bank and recovered.<sup>1</sup> In another case, where the certificate contained the same statement, A. transferred to C. with power and the certificate. A creditor of A.’s attached the shares in ignorance of the transfer, and C. recovered.<sup>2</sup>

§ 712. **In Connecticut** it is settled, that, where either the charter or by-laws declare that transfers shall be made only on the books, a transfer not so made is not valid for any purpose; the registry is the act that changes title.<sup>1</sup>

<sup>3</sup> *Rock v. Nichols*, 3 Allen (Mass.) 342.

<sup>4</sup> *Fisher v. Essex Bank*, 5 Gray (Mass.) 373.

<sup>5</sup> *People’s Bank v. Gridley*, 91 Ill. 457; *White River Savings Bank v. Capital Savings Bank*, 77 Vt. 123, 59 Atl. 197, 107 Am. St. Rep. 754 (1904).

<sup>6</sup> *Dickinson v. Central National Bank*, 129 Mass. 279.

<sup>7</sup> *James v. James*, 81 Tex. 373, 16 S. W. 1087.

<sup>1</sup> § 711. *Bank v. Lanier*, 11 Wall. 378, 20 L. ed. 175 (1870).

<sup>2</sup> *Continental Bank v. Eliot Bank*, 7 Fed. 373.

Such a statement does not charge a pledgee with what could be learned by examining the books, including a by-law and the amount of lien. *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 48 S. E. 226 (1904).

<sup>1</sup> § 712. *Oxford, etc. v. Bunnell*, 6 Conn. 552; *Marlborough Manuf. Co. v. Smith*, 2 Conn. 579; *Northrop v. Newton*, 3 Conn. 544.

§ 713. **The Better Opinion** is, however, that such provisions are only for the benefit of the bank. A purchaser cannot vote or demand dividends, unless he first applies for a transfer in accordance with the charter and by-laws; and beside determining who shall vote and receive dividends, such rules aid the bank in protecting any lien it may have on the stock.

The weight of authority is, that a transfer of a certificate of stock with an irrevocable power of attorney gives *prima facie* title, and renders the stock transferable by delivery of the certificate. And when any party in whose hands the certificate is found is shown to be a holder for value without notice of intervening equities, his title cannot be impeached, and is not affected by a provision in the charter or by-laws making the stock transferable only on the books of the corporation. Such provision is intended merely for the protection and benefit of the company.<sup>1</sup> The certificate of shares with power of attorney is treated exactly as negotiable paper.<sup>1a</sup> In the Mount Holly case, a *bona fide* purchaser from a pledgee without notice of the pledgor's rights held against the assignee of the pledgor, though there was a provision that stock should be transferred only on the books, and this had not been done. In the Rogers case, a purchaser held against a creditor who attached the shares (transferable only on the books) and bought them in at execution sale, having before purchase at the sale notice of the previous unrecorded purchase. The Chancellor held that the equitable title was with the previous purchaser.

In the Broadway Bank case, the act of incorporation said that the stock should be transferable on the books, and that said books should be "evidence of the ownership of said stock in all elections and other matters submitted to the decision of the stockholders of the said company." (The word "only" was not used, which was noticed by the court as distinguishing this case from the Massa-

<sup>1</sup> § 713. Mount Holly, L. & M. Turnpike Co. v. Ferree, 17 N. J. Eq. 118; Rogers v. New Jersey Ins. Co., 4 Halst. Ch. (N. J.) 167; Broadway Bank v. McElrath, 2 Beas. (N. J.) 26; Fatman v. Lobach, 1 Duer (N. Y.) 354; Leavitt v. Fisher, 4 Duer (N. Y.) 1; Commercial Bank of Buffalo v. Kortright, 22 Wend. (N. Y.) 348; Bank of Utica v. Smalley, 2 Cow. (N. Y.) 770; Angell and Ames on Corp., §§ 354, 564; Union Bank v. Laird, 2 Wheat. 390, 4 L. ed. 269; Stebbins v. Phoenix Fire Ins. Co., 3 Binney (Pa.) 394; United States v. Cutts, 1 Sumner 133; Grant v. Mechanics' Bank, 15 Serg. & R. (Pa.) 143; White River Savings Bank v. Capital Savings Bank, 77 Vt. 123, 59 Atl. 197, 107 Am. St. Rep. 754 (1904); Union Bank v. U. S. Exchange Bank, 143 App. Div. 128 (1911), 127 N. Y. S. 661.

<sup>1a</sup> Bank v. Durfee, 118 Mo. 431, 24 S. W. 133.

chusetts cases.) An unrecorded transfer as collateral, or absolutely by delivery of the certificate with an irrevocable power to have the transfer made on the books, carries the equitable title, and the transferee will hold against a creditor of the bailor or transferrer subsequently attaching without notice of the transfer.

In *Bullard v. Bank*<sup>2</sup> a previous unrecorded transfer was sustained against an assignee in bankruptcy. A by-law that proposes to make the stock of a national bank subject to the debts of the holder to the bank is void, and if the bank cannot secure itself by by-law, it certainly cannot secure others. In this case the by-law was that stock should be transferable only on the books of the bank, and "when it is transferred, the certificates thereof shall be returned to the bank and cancelled." So that neither transfer was legally complete, and the equity was with the first.

Again, in the *Scott* case, it was held that an unrecorded transfer of national bank stock takes precedence of a subsequent attachment by a creditor of the assignor, though the creditor has no notice. W., owning shares in a Connecticut national bank, assigned them in New York to D. by delivery of the certificate and a written assignment in blank, with power of attorney in blank to transfer. After the assignment, but before demand upon the bank for transfer, the stock was attached. D. requested the bank to place the stock in his name, but the bank refused, and subsequently the stock was sold on execution to C., whose name was put upon the books. The bank had no by-laws on the subject of transfer. It was held that, in the absence of positive law making transfers without notice to the public fraudulent or void as to creditors without notice, or requiring specific acts in order to a valid transfer, creditors take their debtor's property subject to all *bona fide* liens and equitable transfers, and the bank was liable for refusing.<sup>3</sup> When there is no other equity, priority in time governs.

§ 714. **Refusal of Bank to allow Transfer.**—When a bank improperly refuses<sup>0</sup> to allow a transfer on its books in accordance with a written power, thereby impairing the value of the

<sup>2</sup> 18 Wall. 589, 21 L. ed. 923.

<sup>3</sup> *Scott v. Pequonock National Bank of Bridgeport*, 21 Blatchf. 203. See *Johnston v. Laffin*, 103 U. S. 800, 26 L. ed. 532.

<sup>0</sup> § 714. A bank has no right to refuse to transfer stock on the records before the owner thereof becomes indebted or liable to it. And if it has knowledge that stock is pledged for a loan the lien of the pledgee is superior to a lien of itself for a subsequent loan. *White River Savings Bank v. Capital Savings Bank*, 77 Vt. 123, 59 Atl. 197, 107 Am. St. Rep. 754 (1904).

stock, the action of the bank may be treated as a conversion of the stock, and its value recovered.<sup>1</sup> On failure to transfer stock at the request of a pledgee, a bank is not liable for subsequent depreciation of the stock.<sup>2</sup> This was decided on the form of action. In an equitable action damages as for conversion could not be demanded. B.'s stock in the C. bank was pledged to A. with power to transfer on the books. B. failed, and his assignee notified the bank not to transfer, wherefore it refused A., who brought suit in equity. The decree was that the stock should be sold, the pledgee paid, and if there was any surplus the assignee should have it. A bank having stock standing on its books in the name of a trustee "in trust for" an unmarried female of full age, without power of sale, was held liable to the *cestui* for transferring the stock to a purchaser from the trustee without her consent.<sup>3</sup>

A by-law making a transfer of stock in effect subject to the consent and approval of all the directors, is illegal and void.<sup>4</sup>

A forwarding bank must ascertain the power of the administrator, or other person holding the stock, to transfer the same, and is responsible to the correspondent bank for loss incurred by want of such power.<sup>5</sup>

Where stock in a bank is bequeathed to a trustee in trust for A. during his life, with remainder over, and the executors of the estate, by a simple indorsement, without indicating whether the transfer was a sale or a payment of the legacy, transferred the certificate to the life beneficiary, who transferred it to the bank, which had notice of the provisions in the will, the bank is bound to inquire as to the nature of the transfer, and is liable to the remainderman for any loss resulting from negligence in failing to make such inquiry.<sup>6</sup>

§ 715. **Specific Performance** of contract to sell shares will not be decreed if they are sought in order to control the bank, for that is against public policy.<sup>1</sup>

<sup>1</sup> *Bank of America v. McNeil*, 10 Bush (Ky.) 54 (1873). See *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 48 S. E. 226 (1904); *Ardmore State Bank v. Mason*, 30 Okla. 568, 120 Pac. 1080 (1911).

<sup>2</sup> *Dayton National Bank v. Merchants' National Bank*, 37 Ohio St. 208 (1881).

<sup>3</sup> *Magwood v. Southwestern R. R. Bank*, 5 Rich. L. (S. C.) 379 (1874).

<sup>4</sup> *McNulta v. Corn Belt Bank*, 164 Ill. 427, 45 N. E. 954.

<sup>5</sup> *Ulster Co. Savings Institution v. National Bank*, 5 Silv. (N. Y.) 144.

<sup>6</sup> *Cox v. Bank*, 119 N. C. 305, 26 S. E. 22.

<sup>1</sup> § 715. *Foll's Appeal*, 91 Pa. St. 434 (1879).

§ 716. **The Bank as a Shareholder in its own Capital Stock.** — Shares in the capital stock of the bank may at any time be transferred to it by the holder, for the purpose of securing or discharging his indebtedness to the bank. The bank may then properly hold and own these shares precisely as if it were an outside party. It was said, in the case cited below from 10 Ohio Reports, that it was only for this purpose of securing a debt that a bank could legally become interested in its own stock, and that the propriety of removing the restriction even in cases of this nature was not wholly free from question.<sup>1</sup> But in Vermont banks have a general right to purchase shares in their own stock.<sup>2</sup> If the shares are transferred to the president, or other proper officer, in trust to be held as security for the debt, and to be sold if the debt should not be paid, and any surplus proceeds of the sale after discharging the debt and expenses to be held for the benefit of the debtor, the debtor will be regarded as a shareholder in the corporation so long as the shares remain unsold. The arrangement will not be deemed absolutely to divest him of all title to an interest in his property until the trustee has actually parted with it under the power.<sup>3</sup> But if, while the shares are still in the hands of the trustee, an instalment is demanded which the transferrer neglects to pay, and dividends are declared, which however are only payable to shareholders who have duly paid their instalments, he will not be allowed afterward, upon paying the debt and obtaining a re-transfer of the shares, to recover the dividends from the company. The bank is under no obligation, from the nature of the trust, to advance money to pay the instalments on behalf of the debtor. On the contrary, unless it felt bound to do so, for the purpose of ultimately saving itself from loss by preventing the security from deteriorating in value, it would, strictly speaking, have no right to use the funds of the bank in this manner. It would be a misappropriation of them.<sup>4</sup>

<sup>1</sup> § 716. *State of Ohio v. Franklin Bank of Columbus*, 10 Ohio 91; *Taylor v. Miami Exporting Co.*, 6 Hamm. (Ohio) 176. See *Abilene State Bank v. Strachan*, 89 Kan. 577, 132 Pac. 200, 46 L. R. A. (N. S.) 668, n. (1913); *Corydon Deposit Bank v. McClure*, 141 Ky. 481, 133 S. W. 201 (1911); *Crawford v. Roney*, 126 Ga. 763, 55 S. E. 499 (1906); *Fitzpatrick v. McGregor*, 133 Ga. 322, 65 S. E. 859, 25 L. R. A. (N. S.) 50, n. (1909). Also, by implication, the two cases cited next below.

<sup>2</sup> *Farmers & Mechanics' Bank v. Champlain Transportation Co.*, 18 Vt. 131; 23 *id.* 186.

<sup>3</sup> *Merchants' Bank v. Cook*, 4 Pick. (Mass.) 405.

<sup>4</sup> *Marine Bank v. Biays*, 4 Har. & J. (Md.) 338.

A purchase by an insolvent bank of its own stock is invalid as to its creditors.<sup>5</sup>

**§ 717. Shareholders' Right of Action against Directors.**—The right to sue directors for malfeasance in office, whereby loss accrues to the shareholders, is often expressly given to the shareholders by statutory enactment; though, without doubt, *it exists at common law*<sup>0</sup> in the absence of any legislative intervention. Errors of judgment, unless so gross as to resemble fraud, or to render the acceptance of office practically a fraud by reason of entire incapacity and unfitness for it, give no right of action. But any fraudulent act, or any breach or neglect of statutory or charter provisions, whereby loss is entailed upon the corporation, and the value of the shareholders' property is as a necessary consequence depreciated, gives a right of action at law to each one of them to recover the damage or loss which he individually has sustained. The suit need not join all the directors, nor even all who participated in the wrongful act, as defendants; but any one of them may be sued singly.<sup>1</sup> In this case, however, the declaration is insufficient if it alleges simply that this sole defendant did an act which could in fact be done only by several directors. The allegation must be that he, together with others, did the act. Neither is it sufficient simply to allege that he has done wrongful acts; the nature of the acts should be set forth in general terms, though an accurate description of each part or element going to make up the entire act complained of must often be impossible, and may be dispensed with. Thus if the fault lay in discounting a number of notes in excess of the amount allowed by law, it is sufficient to

<sup>5</sup> *Columbian Bank's Estate*, 147 Pa. St. 422, 23 Atl. 625, 626, 628; *Fitzpatrick v. McGregor*, 133 Ga. 322, 65 S. E. 859, 25 L. R. A. (N. S.) 50, n. (1909).

<sup>0</sup> § 717. Quoted in *Elliott v. Farmers' Bank*, 61 W. Va. 641, 57 S. E. 242 (1907). See *Clark v. Bank of Union*, 72 W. Va. 491, 78 S. E. 785 (1913).

<sup>1</sup> *Conant v. Seneca County Bank*, 1 Ohio St. 298; *Buell v. Warner*, 33 Vt. 570; also in *Foster v. Essex Bank*, 17 Mass. 479, per Pickering and Webster *arguendo*, and by implication in the judgment of the court.

An assignee of stock has a right to sue even though the assignor was a director who knew of prior commission of negligent acts by the directors. *Warren v. Robinson*, 25 Utah 205, 70 Pac. 989 (1902).

An action will lie in behalf of a shareholder to compel the officers participating in an illegal agreement or "voting trust" to repay the bank the money used in defending the illegal agreement, since the assets of the bank are a trust fund primarily for its creditors but secondarily for stockholders. *First National Bank v. Holderness*, 160 N. C. 474, 76 S. E. 624 (1912).



declare generally that such excessive discounting has been performed, without describing the precise notes and loans through which it was done. An allegation that by reason of the act the plaintiff's shares depreciated in value, is a sufficient allegation of loss. That the directors declared a dividend out of the capital stock of the bank, instead of out of earnings, is a good cause of action.<sup>1a</sup> Nor is it a defence that the shareholder who brings the suit has himself received the dividend upon his own shares, provided that he did not know at the time the improper basis upon which it had been declared.<sup>2</sup> It has been held in Massachusetts that the suit must be brought in contract, and that an action sounding in tort will not lie. The portion of the opinion which lays down this rule is clear and conclusive, though it was gratuitously advanced by the court, the point not being strictly necessary to the decision of the cause.<sup>3</sup>

(a) But the right of action of the shareholder, and the claim on which it is founded, though good as against every member composing the board of directors, yet runs against them as individuals, and not in their official capacity. It constitutes their private indebtedness, to be discharged by them from their private property. The corporation is in no sense liable for it, though the act out of which it arose was that of the corporate government acting officially. The suit could not be brought against the corporation, and corporate funds could not be used to compound or discharge it. Hence it follows that a shareholder cannot avail himself of a claim of this nature by way of set-off against a debt due from himself to the bank.<sup>4</sup>

<sup>1a</sup> *Boyd v. Schneider*, 131 Fed. 223 (1904).

Also stockholders may be required to restore dividends improperly declared out of funds other than profits and paid in cash, or applied in satisfaction of unpaid subscription. *Benedum v. First Citizens' Bank*, 72 W. Va. 124, 78 S. E. 656 (1913). See also *Gager v. Paul*, 111 Wis. 638, 87 N. W. 875 (1901); *Miller v. Payne*, 150 Wis. 354, 136 N. W. 811 (1912); *Lapsley v. Merchants' Bank*, 105 Mo. App. 98, 78 S. W. 1095 (1904).

Directors may declare a stock dividend out of profits available for distribution among stockholders. *In re Heaton Estate*, 89 Vt. 550, 96 Atl. 12 (1915), citing *Boardman v. Boardman*, 78 Conn. 451, 62 Atl. 339, 12 L. R. A. (n. s.) 779; *Kalbach v. Clark*, 133 Iowa 215, 110 N. W. 599, 12 L. R. A. (n. s.) 801, 12 Ann. Cas. 647; *Walker v. Walker*, 68 N. H. 407, 39 Atl. 432. They may also declare a tax dividend. *Redhead v. Iowa National Bank*, 127 Iowa 572, 103 N. W. 796 (1905).

<sup>2</sup> *Ibid.*; *Gaffney v. Colvill*, 6 Hill (N. Y.) 567.

<sup>3</sup> *Vose v. Grant*, 15 Mass. 505.

<sup>4</sup> *Whittington v. Farmers' Bank*, 5 Har. & J. (Md.) 489.

*Suit by Receiver, or if He is in Fault, by the Stockholders*

(b) If by gross neglect or inattention to duty directors suffer the corporate funds to be lost or wasted, they are liable, and the receiver of a national bank can bring suit, at least when there is no proceeding pending for forfeiture;<sup>4a</sup> but if the receiver is one of the faulty directors, the action may be by the stockholders, and, if numerous, by one or more in behalf of all.<sup>5</sup>

(c) But in New Jersey it has been held that a stockholder in a national bank cannot maintain an action against the president and directors for their neglect and mismanagement, whereby the bank became insolvent and the stock worthless. There is no legal privity between the stockholders and the officers; the latter are agents of the corporation, not of the individual shareholders. Any money recoverable from the officers would be assets of the bank, and should go to pay its debts, only the surplus being subject to any right in the shareholders.<sup>6</sup>

(d) In California, a shareholder of an insolvent national bank who sues the directors in behalf of the corporation, to recover damages for moneys alleged to have been lost to the bank by reason of their mismanagement of its affairs, is entitled to conduct, manage, and control the litigation until a final determination thereof. But when the litigation comes to an end and money is left in the hands of the plaintiff stockholder, the receiver, appointed to receive and distribute the assets of the bank, is entitled to such money.<sup>7</sup>

§ 718. **Sovereign States as Shareholders.** — It has been already observed that the "State banks" which have at various times been established by divers of the States, though differing from each other in sundry less important particulars, have resembled each other in their main characteristics. The State is a shareholder, sometimes jointly with others, sometimes as sole shareholder. Sometimes it is one of the corporators, sometimes it is not. It usually contributes to the capital from the public funds, and sometimes contributes the whole capital. It shares in the profits, or takes all the profits, as the case may be. But under all the various schemes which have been devised, the State, as a political entity,

<sup>4a</sup> *Stone v. Rottman*, 183 Mo. 552, 82 S. W. 76 (1904).

<sup>5</sup> *Brinckerhoff v. Bostwick*, 88 N. Y. 52.

<sup>6</sup> *Conway v. Halsey*, 44 N. J. L. 462 (1882).

<sup>7</sup> *Chetwood v. California National Bank*, 113 Cal. 649, 45 Pac. 854.

remains distinct from the bank as a corporate entity. Hence it follows, and has been uniformly held, that the creditors of the bank have precisely the same rights to enforce their claims against the corporation, and to subject its assets to the payment of their demands, as if there were no manner of connection or relationship between the bank and the State. Laws which seek to provide means of winding up the corporation upon any plan which would prefer the State to private creditors, or return to the State its investment to the damage and loss of the private creditors, are contrary to the Constitution of the United States, as impairing the obligation of contracts. The State, having gone into a business enterprise, cannot exercise its sovereign powers in such a manner as to gain for itself any peculiar privilege or advantage at the cost of others who have gone into the same enterprise, or who have dealt with the corporation in the due and ordinary course of its business as a bank.<sup>1</sup>

In the case of the *Bank of the United States v. Planters' Bank of Georgia*,<sup>2</sup> the decision was, substantially, that the fact of the State of Georgia being a shareholder in the defendant corporation did not prevent the corporation from being sued in the courts of the United States. Had the State itself been the defendant, the Constitution would have denied jurisdiction to these courts; but it was said in the opinion, that a suit against the bank was "no more a suit against the State of Georgia than against any other individual corporator. . . . The State does not, by becoming a corporator, identify itself with the corporation. . . . It is, we think, a sound principle, that when a government becomes a partner in any trading company it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates and to the business which is to be transacted. . . . The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the bank. . . . *The government by becoming a corporator lays down its sovereignty,*

<sup>1</sup> § 718. *Bank of the United States v. Planters' Bank of Georgia*, 9 Wheat. 907; *Bank of the Commonwealth of Kentucky v. Wister*, 2 Pet. 318, 4 L. ed. 437; *Curran v. State of Arkansas*, 15 How. 304, 14 L. ed. 705; *State v. Bank of the State of South Carolina*, 1 Rich. (S. C.) N. S. 63.

<sup>2</sup> 9 Wheat. 904, 6 L. ed. 244.

so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter." This ruling was afterward affirmed in a case where the State was the sole proprietor, but not, as in the earlier case, a corporator.<sup>3</sup> *Curran v. State of Arkansas*,<sup>4</sup> following in the same logical sequence, holds that the creditor of a State bank, wherein the State is sole proprietor and original furnisher of all the capital stock, may follow the assets and capital of the bank, in equity, for the satisfaction of his claims, in spite of State legislation whereby the legislature has attempted to appropriate to the State (in reimbursement of its original contribution) all the assets of the corporation. In the South Carolina case cited,<sup>5</sup> the State had pledged its faith for the support of the credit of the bank, and when the institution found itself in financial difficulties, the State then sought to take the corporate assets, on the ground that it was a surety for the indebtedness of the bank, was directly liable to the creditors of the bank, and was therefore entitled to appropriate the assets of the institution whose debts it must pay. But, upon the strength of the principles laid down by the Supreme Court of the United States in the foregoing cases, the State court very properly overruled these positions.

(a) In Tennessee the same principle was applied. The legislature enacted that directors be appointed to put the Bank of Tennessee in liquidation, and that they should collect all debts, and cause an assignment of all the bank's property to be made in trust, *first*, to secure the amount of the common school fund deposited in the bank by acts of the legislature; *second*, to secure all just creditors. This was held unconstitutional. The common school fund when deposited became a part of the assets of the bank, to which all creditors had a right to look.<sup>6</sup>

§ 719. **A Case in Tennessee** is a fine illustration of the grouping of legal principles, liability of stockholders, directors, Statute of Limitations, etc., and we give the points together, instead of analyzing the case.<sup>0</sup> M., B., and B.'s two brothers, W. and J., bought all the stock of a bank, to the amount of \$110,000, the charter whereof required the stock to be paid in gold or silver, or

<sup>3</sup> *Bank of the Commonwealth of Kentucky v. Wister*, 2 Pet. 318, 4 L. ed. 437.

<sup>4</sup> 15 How. 304, 14 L. ed. 705.

<sup>5</sup> *State v. Bank of the State of South Carolina*, 1 Rich. (S. C.) n. s. 63.

<sup>6</sup> *State v. Bank of Tennessee*, 5 Baxter (Tenn.) 1 (1875).

<sup>0</sup> § 719. See § 669.

in notes which the directors might deem equivalent thereto. They elected themselves directors, and B. president. They then deposited their own notes, indorsed by each other, to the amount of \$50,000; and this, with \$40,000 in notes of a railroad company, \$8800 in a draft on another bank, and \$1200 in coin, they treated as one half of the whole stock, which was to be \$200,000. After nearly two years' banking operations, including issuance of a large lot of bank notes, J. gave the bank his note, for himself and the other stockholders, for \$50,000, treating it as so much increase of the capital stock. Five years afterwards this note was cancelled without being paid. Inspection of the books was refused, and the names of the indorsers of the stock notes were concealed from the holders of the bank notes and from other creditors of the bank, seeking relief in equity. A bill therefor was brought before the Statute of Limitations had intervened against the makers of the stock notes, but after it had intervened in favor of W.'s personal representatives, W. and J. having died; and the complainants were allowed to resort to W.'s original liability. *Held*, —

1. That such payment of stock in mutually indorsed notes of the directors was not authorized by the charter.

#### *Notes Valid as a Protection of Creditors*

2. That these notes must be regarded as valid obligations for the protection of the issues of the bank and its general creditors, would bear interest, and be subject to the Statute of Limitations, and, when paid or collected, would be credited as payments *pro tanto* on the unsatisfied stock.

#### *Stock Subscriptions was a Debt Independent of the Notes*

3. That until the stock subscribed was actually paid up, it must be considered as a debt subsisting independently of the notes executed in payment thereof, as to which the Statute of Limitations would begin to run from the time a call was made for a payment of the stock.

#### *Interest on Actual Payments*

4. That in adjusting the liabilities of subscribers, actual payments on stock would bear interest from the date at which they were made.

*Payments valued at Actual Cost to Payor*

5. That those stockholders who paid their stock in notes of the bank should be allowed only what they paid for the notes.

*Statute of Limitations did not run during Concealment*

6. That for the period of concealment of the names from the creditors seeking their remedy, the indorsers could not avail themselves of the defence of the Statute of Limitations.

*Ostensible Increase of Stock must be made Actual for Benefit of Creditors*

7. That the creditors of the bank were entitled to have the subscribed \$50,000 for which J. gave his note paid up by the stockholders, and the proceeds should be applied to the satisfaction of their claims. The stock purporting to be subscribed could not be declared to be a mere call on the old unpaid stock; nor could the cashier comply with an instruction from J., upon executing his note, to reduce the stock by the amount so subscribed.

*Directors Liable Personally*

8. That the directors were personally liable for the whole amount of securities accepted for stock in breach of their trust.

*Noteholders entitled to Preference*

9. That the holders of the circulating notes were entitled to priority of payment over the other creditors.<sup>1</sup>

§ 720. **Mandamus to compel Transfer.** — A sheriff has a right to access to the books of a corporation to levy on the stock, and the officers of a national bank may be compelled by mandamus to allow the sheriff access to transfer stock to an execution vendee. The right is enforced by statute in Indiana.<sup>1</sup> Except as to transfers under a judicial sale, (in which case the bank officer becomes a public official *pro hac vice*,) mandamus will not lie to compel a bank officer to make a transfer.<sup>2</sup>

<sup>1</sup> *Moses v. Ocoll Bank*, 1 Lea (Tenn.) 398 (1878).

<sup>1</sup> § 720. *State v. First National Bank of Jeffersonville*, 89 Ind. 302 (1883).

<sup>2</sup> *Bank of Georgia v. Harrison*, 66 Ga. 696 (1881).

§ 721. **Injunction against Alienation.** — How far, under what circumstances, and upon what application, a court of equity would restrain a corporation from an improper alienation of its property, must depend upon these general principles, which guide it in the exercise of its powers; but there is little doubt that, in a proper case made, it would interfere to prevent a disposition of its property for other than corporate purposes.<sup>1</sup>

<sup>1</sup> § 721. *Binney's Case*, 2 Bland, Ch. (Md.) 142; *Kean v. Johnson*, 1 Stockt. (N. J.) 401.

## CHAPTER XLII

### INFORMALITY, ULTRA VIRES, AND FORFEITURE

#### I. FORMALITY.

- § 743. (1) Directory, when the intent of the legislature was merely to prescribe a form that should be sufficient beyond cavil, but not exclusive of other forms.
- § 729. (2) Imperative, when the intent was to exclude other forms. No action can be had on a contract not conforming to an imperative provision, but suit may be brought upon any contract implied in the facts.

§ 744. But imperative formalities will be reasonably construed, and a requirement that corporation contracts shall be signed by directors, etc., will not apply to contracts in the ordinary routine of business, so as to prevent the cashier from drawing, signing, and indorsing checks, bills, etc.

- § 729. (3) Distinction between informality and *ultra vires*.

#### II. ULTRA VIRES AND FORFEITURE.

- § 723. Principles underlying the legal treatment of these subjects.

§ 742. Strict consistency would require that, when any act is done against legal right, the act should be recognized only to punish, and never as a valid, enforceable transaction. The law should not even seem to sustain its own violation. But in many cases, if the law of *ultra vires* were allowed to defeat the suit brought directly upon the contract, there would be good foundation for a second suit, which would bring about substantially the same result as if the court refused to allow the plea on the direct suit. This course is therefore taken in such cases to secure substantial practical justice in the most convenient and least costly way.

- §§ 756, 757. Some cases, however, refuse to recognize an *ultra vires* contract as a contract, but will do justice on the facts.

§§ 724-742. Condensed statement of the law of *ultra vires*.

- § 724. (a) Is the act in question in any particular case an act of the bank.

(b) Is the act *intra vires* or *ultra vires*.

- § 726. (c) Effect of improper or illegal conduct aside from the transaction in suit, or of irregularity in organization of the bank. Cases, § 758.



- (d) *De facto* existence sufficient for ordinary business.
- (e) *De jure* existence necessary to the valid exercise of privilege.
- § 727. (f) Tort creates a liability that no plea of *ultra vires* can ward off.
- § 728. (g) Some acts are *ultra vires* only for lack of consent of the persons for whose benefit the violated provision of law exists; these can be ratified, and only the said persons can object to them. § 750 a.
- § 729. (h) Distinction between *ultra vires* and informality.
- § 730. (i) An executory *ultra vires* contract cannot be enforced.
- § 731. Executed contracts.
- § 732. (j) No action on contract *malum in se*, or void by statute. Cases, § 746.
- § 733. (k) But if the legislative intent is, that the prohibited contract shall be good between private parties, the plea will not be heard. Cases, §§ 750-755.
- § 734. (l) Nor, subject to (j), can one who has received and retained a benefit from the transaction set up the plea *for his own sake*. Cases, §§ 749-755.
- § 735. (m) Nor can it be set up against one who has acquired rights that would be good except for a matter of fact, of which he has no reasonable notice, which consideration divides our subject into *ultra vires* absolute and *ultra vires* by circumstances, the latter being known or unknown. See cases, § 745.
- § 736. In other cases, no action can be brought directly on an *ultra vires* contract. § 736.
- §§ 738, 739. When a bank is not liable on an *ultra vires* transaction.
- § 740. When a bank is liable on an *ultra vires* transaction.
- § 741. When the bank can enforce an *ultra vires* transaction.
- § 742. Discussion of the law of this topic.

CASES.

- §§ 746-750. Where the plea is sustained under *j*, or because neither *k*, *l*, nor *m* apply.  
Plea not sustained,
- § 745. Under *m*.
- §§ 750-755. Under *k* or *l*. See *Union National Bank v. Mathews*, §§ 753, 754.
- §§ 756, 757. Cases recognizing the true rule in *ultra vires*.
- § 758. *Ultra vires* aside from the transaction.

FORFEITURE.

- §§ 760, 761. What constitutes a cause of forfeiture.
  - (1) Nature of acts which are causes of forfeiture.
  - (2) The line between individual action (or such as is attributable only to the officer) and corporate action (or such as, though done by an individual officer or agent, is yet imputable to the bank as a cause of forfeiture).
- § 762. Effect of the occurrence of a cause of forfeiture.
- § 763. Business may be done till a forfeiture is judicially declared.
- § 764. Waiver of a cause of forfeiture by the legislature.

§ 723. **The Thoughts Underlying this Chapter are These: —**

(1) When there is a statutory provision bearing upon the matter, the legislative intent governs. And this intent is to be judged of on the principle that the legislators are not to be presumed to have intended any unjust, unreasonable, or absurd consequence, and statutes will not be administered to produce such result unless their language is incapable of a better construction.

(2) No contract *malum in se* will found an action at law. The maxims, *In pari delicto*, and *Ex turpi causa*, govern, —

(3) Subject to (1), and *bona fide* acquirer of rights for value, which would be good except for *ultra vires* of which he has no actual or constructive notice, will be protected.

(4) Subject to (1) and (2), any benefit received under an *ultra vires* transaction must be accounted for, and no liability for tort, or on contract implied by the facts, can be avoided on the plea of *ultra vires*.

(5) In applying (3) and (4) the result of allowing the plea of *ultra vires* and then holding the parties to do justice on the facts is usually practically identical with refusing to allow the plea, and holding the transaction good as between the parties.

(6) The immediate parties to the transaction can in other cases plead *ultra vires*, e.g., in case of executory *ultra vires* contracts, or where one party has received no benefit and the other has notice.

(7) The party injured by the violation of law is the only one who can raise the objection. This is the general rule, but the law will not aid a plaintiff who had notice of the *ultra vires* character of the transaction on which his claim is based, as against one who is not a party to the transaction, and has received no benefit from it. § 748.

(a) In case the *ultra vires* is not in the nature of the immediate transaction, but in some matter on which it rests, if the just rights of the party are affected by the *ultra vires* he may object, (a purchaser of stock may deny the validity of a by-law creating a lien on the stock, on the basis of which the bank has refused to transfer the stock to him).

*To do Ordinary Business, such as an Individual might, it is Enough to be a De Facto Corporation*

(b) If the *ultra vires* has no real bearing on the rights of a party, D., he cannot object. Irregularity in the organization

of the bank, or election of officers, or a distinct *ultra vires* transaction with some other person, is no just excuse to relieve D. from liabilities arising from his own transactions with the bank; and so, if D. makes a contract with reference and in subjection to another contract, even though the latter be *ultra vires*, D. cannot enlarge his rights by raising the objection; his rights are not affected by it, he contracted in reference to it.

(c) If a limitation is only for the benefit of stockholders, they alone as a rule can make objection, though of course the immediate parties to the contract can sometimes object under (1) and (6). Forfeiture will not be enforced, but the courts will correct the wrong rather than still further punish those for whose protection the law was made.

(d) If a limitation is only for the public welfare and safety, the State is the only party to object by suing for the penalty of forfeiture.

(e) If a limitation has the benefit of more than one party in view, each may object.

*To exercise Privilege, the Bank must be a de jure Corporation*

(f) If, instead of limiting the powers of a corporation making them less than those of a private individual, a provision of law gives it a privilege, or power to do what in a private individual would be an infringement on the rights of others, as to interfere with the transfer of property, to declare shares forfeit for non-payment of calls, or exercise eminent domain, any one encroached upon by the unauthorized exercise of such a power can object. No one can be deprived of his legal rights but by his own consent or due authority of law.

In short, the substance of the matter is this.

Subject to (1), the courts will do substantial practical justice on the facts of each case; in general, they will not recognize a violation of law except to punish; but where justice requires refusal to allow the plea of *ultra vires*, or where justice can be conveniently done in that way, that course will be taken, though it might be more consistent to refuse to recognize any *ultra vires* transaction, to allow the plea in all cases, and make the case stand expressly, as well as actually, simply on the obligations growing out of facts.

A tolerably sure prevision of the substance of the judgment

of law in any *ultra vires* or forfeiture case can be arrived at by applying (1) and (2), and keeping in mind these fundamental principles: that only the person for whose benefit a provision of law was made, and whose rights are infringed by its violation, can sue for redress or penalty, or take *advantage* of it; that the law will not enforce its own violation, nor recognize it except to punish; that ignorance of fact is a good excuse, and one innocent of breaking the law will be protected from loss by a breach committed by another; that an equivalent must be rendered for benefit received, unless it is given to or forced upon the recipient, or unless the parties have put themselves beyond the aid and sympathy of the law, as under (1) and (2), and that one, X., who by his conduct intentionally causes or permits another, Y., to believe a matter, of fact, and act by reason of that belief to his disadvantage, is estopped in any suit with Y. to deny the truth of the supposed fact, and the same rule holds between the representatives in interest of X. and Y.

§ 724. **Ultra Vires and Informality.** — The first question in regard to any act is whether the bank is involved at all. Is it the act of the bank, or the individual act or omission of its agents? For the principle governing this matter in relation to third parties, see § 79 *et seq.*, and in relation to forfeiture, see §§ 760, 762.

§ 725. If the bank is involved, the next inquiry is whether the transaction is *intra vires* or *ultra vires*. What the bank may do, we have considered in § 47 *et seq.*, and will here only remind the reader that the *presumption* is that the bank has not exceeded its powers,<sup>1</sup> and that *substantial* performance of the provisions and conditions of its existence is all that is required. (See Forfeiture, A.)

If it is the act of the bank, and is shown to be *ultra vires*, then we have to ask *the effect* of this fact. The result as between the bank and the sovereign we shall consider under the head of Forfeiture. As between the bank and its officers, or officers and third persons, see § 79 *et seq.* The effect of conduct of a bank in excess of its powers, or noncompliance with any provision of law, as between the bank and third parties is our subject in this chapter. The question whether the plea of *ultra vires* will be allowed in any suit between the bank and third persons, in order to deny the validity of the transaction on which the suit is based, or of any other transaction relevant to the case, is determined by the following principles.

<sup>1</sup> § 725. See *ante*, § 56. Contracts.

§ 726. *In general*, neither the bank nor any private party in litigation with it can escape liability on the ground of any improper or illegal conduct of the bank in other distinct transactions from the one in dispute, nor any original informality or irregularity in the formation of the company; <sup>1</sup> as wrongful loans to other persons, or failure to pay in the capital as required by law. (See § 758 cases.)

In the absence of the statutory provision to the contrary, it makes no difference in a private suit between the bank and third persons upon transactions not involving *privilege*, whether the bank or its officers are legally such, or have only a *de facto* existence. (See §§ 45, 79 *et seq.*) Nor does the occurrence of a cause of forfeiture affect subsequent transactions between the bank and third parties. (See Forfeiture, C.) Justice between the litigants does not depend on these considerations.

But the case is altered if the controversy involves a *privilege* of the corporation, *i.e.*, a power to do acts in contravention of common right, a portion of the sovereignty; as, for example, the power of eminent domain given to corporations in some cases. To sustain such transactions, it is always necessary that the corporation should be a corporation *de jure*, and not simply a corporation *de facto*.<sup>2</sup> No one can be deprived of his common rights or property but by one actually and fully authorized by the sovereign. (See § 758.)

§ 727. **Tort.** — A distinction must be made at the outset between *ultra vires* transactions which constitute a tort, and those involving only matters of contract. No plea of *ultra vires* can ever avail to ward off liability for a tort.<sup>1</sup> A tort is always *ultra*

<sup>1</sup> § 726. *Allison v. Hubbell*, 17 Ind. 559; *Southern Bank v. Williams*, 25 Ga. 534.

<sup>2</sup> *New York Cable Co. v. Mayor, etc. of New York*, 104 N. Y. 1, 10 N. E. 332.

<sup>1</sup> § 727. *Ultra vires* is no excuse for a tort committed by a corporation. *National Bank v. Graham*, 100 U. S. 699, 25 L. ed. 750. A national bank, having come into possession of a warehouse, refused to deliver the grain therein stored to the holder of the grain receipts. The conversion of the grain to its own use was a tort, and it does not matter whether the wrong was done while the bank was in the pursuit of its legitimate business, or was violating its organic law. It cannot be heard to say that its acts as a warehouseman were *ultra vires*, to shield itself from the consequences of another wrongful act. *German National Bank v. Meadowcroft*, 95 Ill. 124; *Pronger v. Old National Bank*, 20 Wash. 618, 50 Pac. 391. So where a national bank itself purchases notes held by it as collateral security when the owner has authorized it to sell to a third party, it is

*vires*. It would be a lamentable state of law in which a court would allow a defendant to say, "I exceeded my power, and, as the law will not recognize any transaction that involves its own violation, you cannot recover." The law will recognize its own violation to punish it, and compel justice, and prevent a wrongdoer from taking advantage of his own wrong; and to escape, the defendant must show that the plaintiff has violated the law in an equal degree, and so is unworthy to ask its aid, for the State cannot be at the expense of sustaining courts to settle the disputes of rascals, and see that neither gets the best of the other.

*Cure of Acts Ultra Vires with Reference to Rights of Particular Persons. Ratification*

§ 728. We may here consider acts which, though *ultra vires*, are so only because they lack the consent of private persons, and are therefore subject to ratification. When an act is only internally *ultra vires*, that is, it is wrongful only by reason of infringing on waivable rights of stockholders, as in the case of a by-law imposing unauthorized liability on them, or any action of the bank giving away its property, or perhaps going security on accommodation paper, its wrongfulness will cease by the express assent or long continued acquiescence of stockholders. And in general it may be said, that, whenever a transaction is *ultra vires* only because of the lack of consent of certain persons, it may be cured by the ratification of those persons, express, or implied by their acquiescence, with knowledge of the facts.

*To Internal Ultra Vires Outside Parties cannot Object*

When a corporation makes a contract not in violation of public law or public policy, but only a breach of trust as to the stockholders, no one but the State or the stockholders, or the corporation in behalf of the stockholders, can object to its validity. For example, where two corporations made such a contract, and a mortgage was given in express recognition of the contract, a bondholder under this mortgage could not set up the incapacity of the corporations to make the contract. Only the corporations

liable for their value as for a conversion, even though it was *ultra vires* for it to sell them as the owner's agent. *First National Bank v. Anderson*, 172 U. S. 573, 43 L. ed. 558, 19 Sup. Ct. 284 (1889); *Anderson v. Bank*, 5 N. D. 451, 67 N. W. 821.

themselves, the immediate parties to the agreement, or the stockholders, parties by representation, held such a legal position in relation to the contract as to enable them to deny the power of the parties.<sup>1</sup> See § 750 *a*.

A subsequent attaching creditor of a shipper cannot object that a bank to whom the bill of lading issued had not authority to take goods as security.<sup>2</sup>

§ 729. **Informality.** — A second distinction is to be taken between the mere informality of a contract and *ultra vires* in its substance. Formalities are directory, or imperative; the former merely prescribe a method, which, if followed, will make the contract valid beyond cavil, but do not exclude other methods; when the provision of law in regard to form is of this class, and a contract is made in any form valid at common law, though not in conformity with such provision, recovery may be had, nevertheless, in a suit on the contract. When the provision is imperative, (which is to be decided by the court on construction of the statute,) neglect of it will prevent any direct action upon the contract, but will never affect recovery upon the contract obligations implied by law on the facts, as to pay money had and received. See cases, § 743.

§ 730. **Executory Contract.** — A distinction lies between an executory contract and one executed in whole or part in regard to the effect of *ultra vires* in the substance of the agreement. An executory contract neither party can enforce.<sup>1</sup> Though there may be liability attaching to officers or bank for tort in connection with the transaction, as in case of misrepresentation, no corporation can claim the aid of the law to compel A. to do what it had no lawful right to receive A.'s agreement to do; that would indeed be asking the law to enforce its own violation; nor can A. claim the aid of law to compel a bank to do what the law says it shall not do. These are clear reasons, and so long as the con-

<sup>1</sup> § 728. *Vermont & Canada R. Co. v. Vermont Central R. Co.*, 34 Vt. 2; *Voltz v. National Bank*, 158 Ill. 532, 42 N. E. 69.

<sup>2</sup> *Ayres, Weatherwax & Reed Co. v. Dorsey Produce Co.*, 101 Iowa 141, 70 N. W. 111.

<sup>1</sup> § 730. *Nassau Bank v. Jones*, 95 N. Y. 115. See *Woodruff v. Erie Railway Co.*, 93 N. Y. 618, and cases cited. *McNulta v. Corn Belt Bank*, 164 Ill. 427, 45 N. E. 954; *Jemison v. Citizens' Savings Bank*, 122 N. Y. 135, 25 N. E. 264; *Wald v. Wheelon*, 27 N. D. 624, 147 N. W. 624 (1914); *Hotehkin v. Third National Bank*, 219 Mass. 234, 106 N. E. 974 (1914); *Metropolitan Stock Exchange v. Lyndonville National Bank*, 76 Vt. 303, 57 Atl. 101 (1903).

tract is executory there is no counter reason to overcome their force.

§ 731. **Executed Contracts.** — We come now to consider the effect of *ultra vires* between the parties to a private suit, in case the tainted contract is executed in whole or part. The judges are not in harmony. They differ as to the interpretation to be put on the meaning of legislatures, and the proper method of doing justice in *ultra vires* cases. To prevent circuitry of action, and do substantial justice in the briefest, least complicated way, the court will often sustain a direct action on an executed *ultra vires* contract.<sup>1</sup>

The following principles have been arrived at upon a wide survey of cases, not only in relation to banks, but throughout the field of corporation law, and are fully verified and illustrated by the banking cases in the succeeding sections.

§ 732. No action can be brought on a contract which is *malum in se*, or expressly declared void by statute,<sup>1</sup> or in regard to which it is the opinion of the court that the legislative intent was to render it void. See §§ 746, 747.

§ 733. An action on an *ultra vires* contract will be sustained, if the legislature has declared that the transaction, though *ultra vires*, shall not be void, but only voidable by the action of the State; or shall have no other effect than to subject the bank to a penalty or forfeiture; or if it is the opinion of the court that such was the intent of the legislature as indicated by the attachment, expressly, of a penalty, or declaring that the transaction should constitute a cause of forfeiture, thereby excluding other consequences (*expressum facit cessare tacitum*); or as indicated by the unreasonable results of the opposite construction; for example, when to hold the *ultra vires* transaction void would punish the very persons whom the legislature plainly meant to protect, or would be followed by other manifest injustice. See §§ 750, 753.

§ 734. (a) Subject to § 732, the plea of *ultra vires* can never be set up for his own sake by a party who has received benefit under the transaction, which he cannot or does not give up; for

<sup>1</sup>§ 731. See *Dexter v. First Guaranty State Bank*, 180 S. W. 1172 (Tex. Civ. App.) (1915); *Kinchloe Irr. Co. v. Hahn Bros.*, 105 Tex. 231, 146 S. W. 1187 (1912); *Phoenix Land Co. v. Exall*, 159 S. W. 474 (Tex. Civ. App.) (1913); *San Antonio Hardware Co. v. Sanger*, 151 S. W. 1104 (Tex. Civ. App.) (1912).

<sup>1</sup>§ 732. See *Black v. First National Bank*, 96 Md. 399, 54 Atl. 88 (1903).



example, that the bank makes a loan to B. beyond the legal limit, does not enable the borrower to avoid payment of the money he received.<sup>1</sup> See § 750.

Where the law limits the amount of an individual deposit, a deposit in excess of this may be recovered by the depositor although he cannot claim interest on the excess.<sup>2</sup>

(b) But the fact of benefit will not prevent a party setting up the plea when it is not really for his own sake he pleads, but on behalf of innocent parties who have a superior equity to the party against whom the plea is made; as if it is in favor of *intra vires* creditors of an insolvent bank, and against *ultra vires* creditors with notice. See § 746.

§ 735. The plea of *ultra vires* can never be set up *against* one who has acquired rights under the transaction which would be valid in law but for a *matter of fact* of which he had no reasonable notice. Two facts must coexist in reference to the person against whom the plea is urged, to bring the case within this section; first, he must be in the position of a *bona fide* holder for value, he must have parted with some property or right, or suffered some loss pecuniary, or in some way altered his position (to his disadvantage if the contract is null) in consequence of the transaction; and second, the fact by reason of which the transaction is *ultra vires* must be one which he did not know of, and could not by reasonable diligence have known, *i.e.*, one of which he had at the time of the transaction no notice actual or constructive.<sup>1</sup> See § 750.

### *Ultra Vires Absolute, or by Circumstance*

Under this head we must distinguish between acts that are *ultra vires* absolute, or such as are beyond the powers of the bank for any purpose and under all circumstances, (as alienating or mortgaging its franchises,) and acts that are *ultra vires* by circumstance, or such as are beyond its authority for some purposes or

<sup>1</sup> § 734. O'Hare v. Second National Bank of Titusville, 77 Pa. St. 96; Pangborn v. Westlake, 36 Iowa 546; Vining v. Brieker, 14 Ohio St. 331; Benton Co. Savings Bank v. Boddicker, 105 Iowa 548, 75 N. W. 632; First National Bank v. Henry, 159 Ala. 367, 49 So. 97 (1906); First National Bank v. Greenville Oil etc. Co., 24 Tex. Civ. App. 645, 60 S. W. 828 (1901); Miles v. Macon County Bank, 187 Mo. App. 230, 173 S. W. 713 (1915).

<sup>2</sup> Taylor v. Empire State Savings Bank, 66 Hun (N. Y.) 538.

<sup>1</sup> § 735. Quoted in Sturdevant Bros. v. Farmers' etc. Bank, 69 Neb. 220, 95 N. W. 819 (1903).

under some circumstances, but are within its power under other circumstances or for other purposes. For instance, a bank may borrow for legitimate banking purposes, but not for the purpose of speculation; again, it may loan money to a director, but not beyond a certain limit; it may loan to the public, but only to a certain amount; it may endorse negotiable paper, but not for accommodation; for other things it may and may not do, see § 47 *et seq.* Now, it is obvious that where the lack of power is purely a matter of law, as in *ultra vires* absolute, no one can plead ignorance; but when some matter of fact may obscure the *ultra vires* character of the contract, the party may or may not have had notice of such fact; and we have two classes: *ultra vires* by circumstance known, and *ultra vires* by circumstance unknown, according as the person in controversy with the bank had or had not actual or constructive notice. This distinction is of great import, for the ignorance of law is no excuse for breaking it; but innocent ignorance of fact is an excuse; and if a person has in fact done nothing unlawful, if he has used due diligence to ascertain the facts, and on the circumstances within his reach his conduct is legal, such a person the law will hold harmless.

§ 736. In other cases the plea will be allowed; for, in the absence of strong reasons to the contrary, the law will not sustain an action based on a transaction it forbids. For example, where the party setting up the plea has received no benefit, and the other party either has not parted with value, or had notice. See § 746.

§ 737. **Statement from another Point of View.** — It may be of use to restate the chief points of the law above laid down, in terms of the bank's liability and power to enforce.

§ 738. **A Bank is not liable, i.e.,** it may set up the plea of *ultra vires*, —

(1) In any case in which the contract on which the suit is based is *malum in se*, or expressly declared void by the legislature, or the court is of opinion that such was the legislative intent.

§ 739. (2) Also in any case [unless it should fall under (3)] where it has received no benefit, (or, it seems, if it can and does return the benefit received), and at the same time one of two things is true of the opposite party; first, that he had reasonable notice of the unlawfulness of the transaction (that its *ultra vires* character did not depend on a matter of *fact* which he did not, and could not with reasonable diligence know); or, second, that

although without notice he is also without damage by the transaction, having parted with nothing of value.

§ 740. **The Bank is liable.** — (3) In any case where the unlawfulness of the transaction depends on statutory provision which expressly declares that the contract is not to be invalid, or when such is in the opinion of the court the legislative intent, considering the context and the consequences of an opposite construction. And that such construction would punish the very parties whom the legislature has manifested a wish to protect, or would allow the bank to take advantage of its own wrong, or would in any way work manifest injustice, or that the legislature has expressed what shall be the consequence of violation of the law by attaching a penalty or forfeiture to it, thus by implication excluding other consequences, are reasons often weighty against considering a transaction void, and allowing the plea of *ultra vires*.

(4) In other cases not falling under (1) or (3), as where the excess of power is not a violation of statute, but of common law, or if a breach of statute there is nothing in the law to show whether the legislature intended the transaction to be void or not, then the bank will be liable on its *ultra vires* contract, *provided* that either of the following combinations of fact exist: *first*, that the bank has received benefit from the transaction which it cannot or does not restore, (and giving up the benefit would in many cases be about the same as paying the amount sued for); or, *second*, that the opposing party against whom the plea of *ultra vires* is hurled can show *both* that he had no notice actual or constructive that the contract was *ultra vires* (its character as such depending on the presence or absence of some matter of fact, which said party did not and could not with reasonable diligence know), *and* that he is a holder for value, or has parted with value or changed his condition disadvantageously by reason of the transaction.<sup>1</sup> If either of these points fails, the second proviso does not avail to stay the plea of *ultra vires*. If *neither proviso* is sustained by the facts, then contracts within the description in the beginning of (4) come under the ban of (2), and are void; for, in the absence of strong reasons to the contrary, no act in violation of law can be held to be a valid act.

<sup>1</sup> § 740. Creditors' Claim etc. Co. v. Northwest etc. Co., 81 Wash. 247, 142 Pac. 670 (1914).

*Burden of Proof*

(a) The burden of proof in any case is first to show that that act is *ultra vires*, and if this is shown the burden is on him who objects to the plea of *ultra vires* and wishes the court to hold that the contract is not void.

§ 741. **The Bank cannot enforce an Ultra Vires Contract** in cases falling under (1). In cases coming under (2), *i.e.*, where the other party to the suit has received no benefit which he retains, the bank can never enforce; [(2) does not include cases falling under (3);] for the other element in the combination is always present when the bank is plaintiff, since it can never claim ignorance of its own powers, or the facts that make the transaction wrong (at least if cases can occur in which ignorance of such fact could innocently exist on the part of the bank, they must be rare). So in (4) the second proviso has no application when the bank is plaintiff, but it can enforce contracts within the first proviso, or coming under (3).

§ 742. **Discussion of above Rules. Change Suggestion.** — This statement of the law derived from the cases satisfies the sense of justice except in respect to cases falling under the provisos of (4). The arguments from the principles of law relating to estoppel, and *bona fide* holder for value without notice, and from the maxim that no one shall take advantage of his own wrong, and that every one must account for benefit received (subject to the rule *in pari delicto*), do certainly prove that cases coming within the provisos of (4) call for the interference of the court in order to establish justice; but they do not prove that, in order to do this, it is necessary to sustain a direct action on the contract. The legislature may say, this contract shall not be void, it shall be enforced between the parties, and the only consequence of the excess of power shall be a penalty or forfeiture attaching to the corporation, if the government sees fit to enforce it. When such legislative intent is clear, the cases fall within (3), and it is proper that the plea of *ultra vires* should not be allowed.

But when there is no clear evidence of such legislative intent, it seems a very queer statement that the law will enforce a suit based directly upon a contract which that same law has declared should not be made, on the idea that the sovereign alone can object. The sovereign *has* already objected, and the law should not recognize the contract as a contract, except to punish. If one party

has notice that the transaction is in violation of law, and the other has not, the first should not be allowed to set up the plea of *ultra vires*, for that would be to allow him to take advantage of his own bad faith; but when both parties had notice, the plea should be allowed, for otherwise one who had notice might gain by his violation of law, and the party who sets up the plea is no worse than the other, and does not thereby save himself from a just loss, but from an illegal loss. In every case, the object should be to prevent gain from the violation of law, to repress evil conduct.

The law may always recognize the facts of the case, and enforce the contract implied by law on the circumstances, and thus do substantial justice without the ignominy of enforcing its own violation. The difference in the practical results of the two methods of thought are slight in many cases, which fact, together with the desire for simplicity and avoidance of circuitry of action, has led the courts to the present rule. But it is certainly to be regretted as breaking the consistency of the law; and beside, the results of the two rules are not always the same. Suppose a bank makes an *ultra vires* contract with B. for the delivery to it of goods at a future day, (intending to buy and sell for a profit, *i.e.*, traffic or speculate,) and pays for them by rendering service; and before the day of delivery, the goods rise very much in value, and B. in supplying the goods would be at an expense double the value of the service rendered to him, the benefit of which, however, he may not be able to relinquish, as he cannot return their efforts to them, nor perhaps even tell precisely what are the products of this service, they having gone into his general business. Now a rule which sustains an action on the contract because the plea of *ultra vires* cannot be set up by one who has received a benefit he retains, would give the bank the value of the goods at the time set for delivery, while justice requires that the bank should receive only the fair value of this service on a *quantum meruit*, and not double its value; the bank has no right to the goods at all, and to enforce such a contract would be to enforce a violation of law, not in order to do justice, but to do injustice and enable the bank to derive advantage from its own wrong by the aid of law. The courts would not probably carry the rule to this length, but why not have a rule that would stand analysis, *viz.* : —

*True Rule*

All benefit received under an *ultra vires* transaction must be accounted for, and substantial justice will be done between the parties (subject of course to the rules *in pari* and *ex turpi causa*; which are a portion of justice themselves), in all *ultra vires* transactions upon the facts of the case and the obligations raised by the law therefrom, but no private suit directly on an *ultra vires* contract will be sustained, unless there is a clear legislative intent to that effect, or where the law of negotiability applies in favor of a *bona fide* holder without notice, or in favor of one without notice actual or constructive as against one with notice, for in such case the latter is estopped.

§ 743. **Cases on the Effect of Informality, Directory and Imperative.** — The illegality which is set up to defeat a contract on the ground, either that the corporation exceeded its powers in making it, or that essential formalities imposed in direct and imperative terms by legislative enactments were disregarded, must go to the validity of the very contract itself, not alone to the written evidence thereof; since otherwise no *practical* advantage will result to the party setting it up. The matter has been very thoroughly discussed in several important cases in New York, and this doctrine has by no means escaped severe criticism. But in spite of criticism it has been too firmly established to be considered open to doubt. The series of causes known as the "Utica Insurance Company Cases" form the basis of the adjudication, of which the result is, that where certificates of deposit, bonds, or other instruments expressing contracts, are issued, which the corporation had not power to issue, the holder cannot enforce them and sue upon them as contracts. If he undertakes to do so he will be defeated by their illegality. But he may abandon them and go upon the original cause of action, which was the deposit with or the loan to the bank, and then he will be allowed to recover. The document issued cannot itself be sustained; but if it is abandoned altogether, the fact of its wrongful issue will not operate to prevent the success of a suit for money had and received.<sup>1</sup> *A fortiori*,

<sup>1</sup> § 743. *Utica Ins. Co. v. Scott*, 19 Johns. (N. Y.) 1; *Utica Ins. Co. v. Kip*, 8 Cow. (N. Y.) 20; *Utica Ins. Co. v. Cadwell*, 3 Wend. (N. Y.) 296; *Utica Ins. Co. v. Kip*, *id.*, 369; *Utica Ins. Co. v. Bloodgood*, 4 *id.*, 652; cited and approved in *Curtis v. Leavitt*, 15 N. Y. 9; *Boisgerard v. New York Banking Co.*, 2 Sandf. Ch. (N. Y.) 23; *Philadelphia Loan Co. v. Towner*, 13 Conn. 249; *Robinson v. Bland*, 2 Burr. 1077; *Cundy v.*

recovery could be had in such a suit, by virtue of this doctrine, where the instrument issued was not intrinsically illegal, but was only rendered so by reason of its not being executed with precisely the formalities demanded in the incorporating act.<sup>2</sup> But where the instrument is negotiable paper of any description, and perhaps even in other cases, the fact that it has not been signed by the officers of the bank who are designated in the organic law as the persons who shall sign, does not even invalidate the contract itself in the hands of *bona fide* holder, unless the same statute expressly and in terms enacts that an instrument not so signed *shall be void*. The mere declaration that contracts "*shall be signed*" by certain officials only points out the shape in which, if any contract be executed, it shall be imperatively regarded as sufficiently executed. But it does not necessarily deprive the corporation of the right to delegate to its officers power to make contracts which shall be valid without these specified signatures. If the statute contains no positive prohibition, depriving the association of the right to appoint other agents to contract and sign on its behalf, such deprivation will not follow as an implication from the mere statement that contracts "*shall be signed by*" designated officers. "Where the associates have not lodged the power elsewhere, where the matter is to be determined upon the statute alone, without any action of the artificial body, contracts within the scope of its general powers must be signed by the officials appointed in the statute. But the statute was not designed as an appointment of particular agents, to the exclusion of all right in the corporate or associate body itself to appoint other agents to do lawful acts and enter into lawful contracts." Such was the language of Judge Comstock in the case of *Barnes v. The Ontario Bank*,<sup>3</sup> following the decision in the earlier case of *Safford v. Wyckoff*.<sup>4</sup> Since these decisions, the question seems to have been regarded as laid at rest in New York. But the views of Chancellor Walworth, expressed to a somewhat different effect in the last-named case, though over-

Marriott, 1 Barn. & Ad. 696; *Wilson v. Vysar*, 4 Taunt. 288. By implication, the same doctrine is sustained by Chancellor Walworth in *Safford v. Wyckoff*, 4 Hill (N. Y.) 442, where, upon a written contract improperly executed, he thought plaintiff should not be allowed to recover "without showing that he has paid money thereon, which has been applied to the use of the association, so as to create a contract by operation of law."

<sup>2</sup> See Chancellor Walworth, in *Safford v. Wyckoff*, 4 Hill (N. Y.) 442.

<sup>3</sup> 19 N. Y. 152.

<sup>4</sup> 4 Hill (N. Y.) 442.

ruled by a majority of the Senators, will doubtless suffice with some minds to throw a doubt upon the propriety of this ultimate conclusion. The practical inconveniences which would result from the contrary ruling are forcibly put by Judge Comstock. But it is a fair criticism, that these show the imperfection of the enactment, and should be cured by legislation; while Chancellor Walworth's simple remark, "When the legislature declare that all contracts made by these associations *shall* be signed in a particular way, I am not prepared to admit that the court is authorized to say that a valid written contract *may* be made in a different form", may express a more sound position than that to which Judge Comstock is brought by his ingenious flanking movement.

§ 744. **Any positive Words in the Statute, declaring that Contracts executed otherwise than as provided shall not be Binding, of course, avoid the entire Controversy.** — But where such words do occur, or where the courts are unwilling to adopt the subtlety of Judge Comstock for the purpose of evading their meaning, the further question arises, To what contracts does the regulation apply? The technical language of the law might make the word "contract" cover every indorsement, every bill of exchange, and possibly even every check or draft which the cashier might be obliged to make or sign in the ordinary course of business. Every petty agreement occurring in the daily routine might come within its scope. The machinery of banking business, in its simplest parts, would become intolerably cumbrous. It is obvious that this could not have been the intent of the framers of such statutes. The courts have accordingly given a reasonable construction, and one somewhat more narrow than the ordinary broad one of the common law, to the word "contract", when thus used. It has been held not to *restrict the power of the cashier to draw, sign, and indorse bills of exchange, drafts, checks, and the like instruments*, since the power to do so is by the usage of business universally understood to be inherent in his office, and has often been so declared by the courts.<sup>1</sup> Chancellor Walworth, in his opinion before referred to,<sup>2</sup> also says, this term "contract" does not, "of course, include a class of contracts that are never in fact made by the

<sup>1</sup> § 744. Angell & Ames on Corporations, § 300; Merchants' Bank v. Central Bank, 1 Kelly (Ga.) 418; Carey v. McDougald, 7 Ga. 84; Mechanics' Bank of Alexandria v. Bank of Columbia, 5 Wheat. 326, 5 L. ed. 100; Northern Bank of Kentucky v. Johnson, 5 Coldw. (Tenn.) 88; Jones v. Hawkins, 17 Ind. 550; Allison v. Hubbell, *id.* 559.

<sup>2</sup> Safford v. Wyckoff, 4 Hill (N. Y.) 442.



association, but which arise by operation of law merely; as, in the ordinary case of an implied assumpsit to repay moneys deposited by dealers with the bank. In such case, the certificate of the cashier or teller, or the entry in the pass-book of the customer, is not a contract; it is only evidence of a fact, which might be proved by parol, to raise an implied promise by operation of law."

### Cases

§ 745. **The Plea of Ultra Vires cannot be set up against Persons acquiring Rights under a Transaction Ultra Vires by Circumstance unknown.** — Where the bank issues its promise to pay in a form in which it has a right to issue promises to pay, but under circumstances which render the issue of this especial promise illegal and void as *ultra vires*, the contract may be enforced against the bank by a *bona fide* holder for value and without notice. Thus, for example, it is a general rule that a bank has no power to engage as surety for another in a business in which it has no interest and from which it can derive no profit. Therefore it has no right to become an accommodation indorser. If it does so, the indorsement will be utterly void in the hands of any person having notice of the fact that it was made for accommodation. But inasmuch as a bank may become an indorser for divers legal purposes, and the contract can therefore show upon its face no signs of invalidity, it will be treated as valid in the hands of a holder for value without notice of the facts.<sup>1</sup>

### *Accommodation Paper. Bona Fide Holder for Value without Notice can recover in Spite of Ultra Vires*

(a) In a recent case in Connecticut,<sup>2</sup> the treasurer of the Howe Company was authorized by vote of the directors to accept bills on the company. The company under its charter had no power to accept accommodation paper. S., having no funds with the Howe Company, drew a bill on it which the treasurer accepted. The plaintiff discounted the bill, not knowing its accommodation character, and the court held that he could recover as a *bona fide*

<sup>1</sup> § 745. *Safford v. Wyckoff*, 4 Hill (N. Y.) 442; *Vallett v. Parker*, 6 Wend. (N. Y.) 615; *Bank of Genesee v. Patchin Bank*, 3 Kern. (N. Y.) 309. *Studevant Bros. v. Farmers' etc. Bank*, 69 Neb. 220, 95 N. W. 819 (1903). See also argument and citations per *Beardsley*, in *Leavitt v. Palmer*, 3 Comst. (N. Y.) 19 (pp. 24, 25).

<sup>2</sup> *Credit Co. v. Howe Machine Co.*, 54 Conn. 387-389 (1887).

holder for value without notice, Park, C. J. dissenting, because he thought it clear on the facts that the plaintiff had notice. The remarks of the court are very instructive: "We may admit generally that the treasurer had no authority to accept accommodation paper, and that the directors had no power to confer upon him such an authority. *But in order to prevent injustice and maintain the integrity of mercantile paper, it is necessary to limit the application of the principle to parties with notice.* This limitation necessarily results from the fact that every business corporation has power to deal in negotiable paper in the line of its business. As such paper does not ordinarily show on its face the circumstances of its origin or the purpose for which it is made, it becomes important to distinguish those who have notice of its character and purpose from those who have not. We pass now to the second branch of the proposition, — that persons dealing in commercial paper of a corporation are bound to take notice of the extent of its power. Here, too, we may properly admit that the proposition is a correct one; but care should be exercised in its application not to extend it beyond its appropriate limits. *To clearly understand those limits, a distinction is to be observed between the terms of a power and the circumstances under which it is exercised.* Parties may well be required to take notice of the former; but to require them to have knowledge of the latter would, in many cases, result in gross injustice. Especially is this so where the agent or officer of the corporation who exercises the power at the same time represents the corporation, and speaks for it in giving information as to the circumstances under which it is exercised. No better illustration is needed than the case at bar. The treasurer of the defendant was the officer specially authorized, by vote of the directors, to accept bills of exchange; at the same time, by virtue of his office, he was the person held out by the corporation as the proper one to inform holders whether the drawer draws against funds. The corporation virtually says, 'You may safely trust the word of our treasurer on that subject.' When he speaks, the corporation speaks. By accepting the draft he declares that the drawer has funds, and that is the declaration of the corporation. Mercantile paper does not require those who would become its holders to go to the acceptor and insult him by the question, Did you tell the truth when you accepted that paper? They have a right to assume that he tells the truth, and to act accordingly. If the treasurer in fact misrepresents

the corporation, the corporation, and not the person who trusts him, should bear the loss. An instructive and very interesting case on this subject is *Farmers and Mechanics' Bank v. Butchers and Drovers' Bank* (16 N. Y. 125). The defendant's counsel cite that case, and quote from it this sentence: 'One who deals with an agent has no right to confide in the representations of the agent as to the extent of his powers.' The court, however, clearly recognize the distinction to which we have adverted, — namely, between the terms of a power, and extrinsic facts, which may or may not, according to the circumstances, affect the rights of third persons when the power is exercised. That was an action on a certified check. The defence was that the bank had no funds of the drawer. Immediately following the sentence quoted, the court uses this language: 'If therefore a person, knowing that the bank has no funds of the drawer, should take a certified check, upon the representation of the cashier or other officer by whom the certificate was made that he was authorized to certify without funds, the bank would not be liable. But in regard to the extrinsic fact, whether the bank has funds or not, the case is different. That is a fact of which a stranger, who takes a check certified by the teller, cannot be supposed to have any means of knowledge. Were he held bound to ascertain it, the teller would be the most direct and reliable source of knowledge, and he already has his written representation upon the face of the check. If therefore one who deals with an agent can be permitted to rely upon the representation of the agent as to the existence of a fact, and to hold the principal responsible in case the representation is false, this would seem to be such a case. It is, I think, a sound rule, that where the party dealing with an agent has ascertained that the act of the agent corresponds in every particular, in regard to which such party has or is presumed to have any knowledge, with the terms of the power, he may take the representation of the agent as to any extrinsic fact which rests peculiarly within the knowledge of the agent, and which cannot be ascertained by a comparison of the power with the act done under it.' "

Though a contract is in excess of the powers of a company, if not in violation of express charter provisions, or of any statute prohibiting it, and the company has by its promise induced another relying on it to expend money on the contract, the company is liable thereon.<sup>3</sup>

<sup>3</sup> *State Board of Agriculture v. Citizens' St. R. W. Co.*, 47 Ind. 407.

§ 746. **Cases in which the Plea of Ultra Vires is Sustained,**<sup>0</sup> either because the contract was *malum in se*; or because it was expressly declared void, or the court deemed that this was the legislative intent (and on this point it is instructive to compare the Fowler case, § 747, with the United States decision in *Union National Bank v. Mathews*, § 754, and the Maryland case of *Lester v. Howard Bank*, § 751); or because of the coexistence of two facts, viz. that the party against whom the plea was set up had reasonable notice of the *ultra vires* character of the transaction, or if he had no notice, yet had not parted with any value or sustained loss in the matter, and that the party setting up the plea had either received no benefit from the transaction, or set it up, not to retain benefit for himself, but on behalf of innocent persons having a superior equity to the party against whom the plea is made, as in the last case quoted in § 749, where the bank was insolvent, and the plea was allowed for the benefit of innocent creditors.

In *Western Bank v. Mills*, the contract itself was of an illegal nature, and was especially declared void, and it was held that the bank could not sue on the notes it had discounted.<sup>1</sup>

In *Springfield Bank v. Merrick*, the contract was to pay in forbidden currency, an act prohibited by law under a heavy penalty, and the court held that a note payable in such currency was void, and no action could be sustained on it.<sup>2</sup>

In Maryland and Minnesota it has been held that a "purchase" by a bank passes no right of action on the note. (See § 73.)

The Supreme Court of New York have held that where a note was discounted at a usurious rate of interest, and the law simply prohibited banks from entering into such usurious contracts, the contract and note were void, and could not be enforced at all, or in any part, in a suit on behalf of the bank. The case is ingeniously, but not very satisfactorily, distinguished from the cases decided in the United States Supreme Court.<sup>3</sup>

<sup>0</sup> § 746. Expansion of §§ 732, 734 b, 736.

<sup>1</sup> *Western Bank v. Mills*, 7 Cush. (Mass.) 539.

<sup>2</sup> *Springfield Bank v. Merrick*, 14 Mass. 322.

<sup>3</sup> *Seneca County Bank v. Lamb*, 26 Barb. (N. Y.) 595. See § 750.

But by a series of cases in the Court of Appeals it is now settled that the provisions of the usury law declaring usurious notes void have been replaced to the extent that they have no application when the notes have been given to or the usury received by the bank or when the bank is a transferee of a note usurious between the original parties. The New York banking laws of 1892, c. 689, as amended by the laws of 1910 c.

A similar ruling was made by the Supreme Court of Ohio, upon the strength of the case in 2 Peters, § 747. The court say that a contrary doctrine would prevail in the case of an individual; but the bank having undertaken to act *ultra vires* has not, in law, succeeded in acting at all, and the contract is void.<sup>4</sup>

It is a general rule, though, as we have seen, with exceptions, that it is primarily essential to the validity of any contract to which a bank is a party that the undertaking of the bank therein should be within the scope of its legitimate powers. As it is utterly incompetent to act, so it is equally incompetent to agree or bind itself to act, in any business, for any purpose, or in any manner not authorized by the law of its corporate existence. Its assumption or promise to perform any act trespassing beyond these limits is void *ab initio*, and the fundamental defect can be cured by no subsequent proceeding short of an act of the legislature.<sup>5</sup>

A contract to secure a depositor by a pledge of the assets of the bank is *ultra vires* and unlawful.<sup>6</sup>

A trust company has no authority to purchase stock in a bank and if it does so for the purpose of securing control of the bank the transaction is void.<sup>7</sup>

A contract for a loan beyond the legal limit cannot be enforced against the bank;<sup>8</sup> nor can a contract of guaranty of a building contract be so enforced.<sup>9</sup>

§ 747. The two cases following, from Illinois and Pennsylvania, though overruled in consequence of the decisions of the United States Supreme Court in *National Bank v. Mathews*, are yet

310, place the state banks of New York on the same footing as national banks in regard to usury. *Schlesinger v. Kelly*, 114 App. Div. 546 (1906), 99 N. Y. S. 1083; *Schlesinger v. Lehmeier*, 117 App. Div. 428 (1907), 102 N. Y. S. 630.

<sup>4</sup> *Bank of Chillicothe v. Swayne*, 8 Ohio 257; *Bank of Wooster v. Stevens*, 1 Ohio St. 233. See *Anglo-American Land Co. v. Lombard*, 132 Fed. 721 (1904).

<sup>5</sup> See the *Utica Insurance Company Cases*, *supra*; *Bank of Chillicothe v. Swayne*, 8 Ohio 257; *Bank of Wooster v. Stevens*, 1 Ohio St. 233; *First National Bank v. Munroe*, 135 Ga. 614, 69 S. E. 1123, 32 L. R. A. (N. S.) 550 (1911); *First National Bank v. American National Bank*, 173 Mo. 153, 72 S. W. 1059 (1903).

<sup>6</sup> *Commercial Banking etc. Co. v. Citizens' Trust etc. Co.*, 153 Ky. 566, 156 S. W. 160 (1913).

<sup>7</sup> *State v. Bankers' Trust Co.*, 157 Mo. App. 557, 138 S. W. 669 (1911).

<sup>8</sup> *Wald v. Wheelon*, 27 N. D. 624, 147 N. W. 402 (1914).

<sup>9</sup> *Fidelity etc. Co. v. National Bank*, 48 Tex. Civ. App. 301, 106 S. W. 782 (1907).

very instructive on the question of legislative intent, and other aspects of *ultra vires*.

A mortgage given to an officer of a national bank at the time of a loan by the bank to secure its payment, being in effect made to the bank, is void under U. S. Rev. Sts. § 5136, cl. 7, and will not be enforced by the courts.

The fact that a law creating a banking corporation prescribes one mode of exercising an express power, implies an inhibition of the exercise of the power in any other way.<sup>1</sup>

In the Pennsylvania case,<sup>2</sup> Fowler gave to a national bank, not being then indebted to it, a mortgage to secure the bank for notes, etc., *thereafter* to be discounted for him. *Held*, —

1. That under the National Currency Act, June 3, 1864, the mortgage was void.

2. Lending money by a national bank on mortgage or real estate security is *ultra vires*, and forbidden.

3. The mortgage being void, no action on it could be sustained.

4. Courts, even with the consent of the defendant, will not enforce a contract in violation of a statute, although not expressly made void.

5. *If a plaintiff cannot open his case without showing that he has broken the law, courts will not assist him to recover, whatever his justice may be.*<sup>2a</sup>

“The banking powers of these associations are to be found in the eighth section, and are ‘to carry on the business of banking by *discounting* and *negotiating* promissory notes, drafts, bills of exchange, and other evidences of debt; by buying and selling exchange, coin, and bullion; by loaning money on *personal* security; by obtaining, issuing, and circulating notes according to the provisions of the act.’ In view of the rule of interpretation of such charters given to us by the Federal courts, and the maxim, *Expressio unius est exclusio alterius*, the argument might close with the terms of the power to loan money on *personal* security; for agreeably to this rule and maxim, no other security than personal can be taken for money lent. . . .

“Now comes the prohibition against any other mode, and the appointed time, such as shall have been legally acquired, shall be held: ‘Such association shall *not* purchase or hold real

<sup>1</sup> § 747. *Fridley v. Bowen*, 87 Ill. 151.

<sup>2</sup> *Fowler & Vankirk v. Scully*, 72 Pa. St. 456 (1872).

<sup>2a</sup> *Bank of British North America v. Oglin*, 79 Cal. 463, 21 Pac. 863.

estate in any *other case* or for any *other purpose* than as *specified* in this section, nor shall it hold possession of any real estate under mortgage, or hold the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years.' . . .

"If anything were wanting to make plain that which is clear, it is the amendment of the second clause in the twenty-eighth section, and the debate on it in the Senate. See Congressional Globe, April 26, 1864. The amendment of the committee proposed to strike out 'for loans made by such association in the usual course of its banking business, or for money due thereto', and to insert 'for debts previously contracted', so as to make the clause read, 'such as shall be mortgaged to it in good faith by way of security for debts previously contracted.' At the call of Senator McDougall, Senator Sherman explained the amendment of the committee to allow the banks to take a mortgage for a pre-existing debt, but not to loan money on real estate security. 'Not to loan money on mortgage?' said Mr. McDougall. Mr. Sherman again replied, 'They have no right to loan money on mortgage; they must take personal security; but after a debt is contracted they may, in order to secure the debt, take a mortgage upon real estate.' The amendment was adopted, and the section now stands so.

"*The doctrine that a contract in violation of the provisions of a statute, though not expressly made void by it, is null, and will not be enforced by the courts,*<sup>26</sup> *is very distinctly stated, and sustained by authorities, in the case of the Bank of the United States v. Owens* 2 Pet. 527, 7 L. ed. 508). Johnson, J. said: 'No court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of the country; how can they become auxiliary to the consummation of violations of law? There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal.' The same principles are recognized in *Coppell v. Hall* (7 Wall. 558, 19 L. ed. 248). Justice Swayne, commenting on the instruction of the court below, that the illegality had been waived by the act of the defendant, says: 'In such cases there can be no waiver. The defence is allowed, not for the sake of the defendant, but of

<sup>26</sup> In *Interstate Trust etc. Co. v. Reynolds*, 127 La. 193, 53 So. 520 (1910), it is held that a contract by a bank to enter into a partnership for the building of levees will not be enforced, as such is contrary to the Constitution.

the law itself.' Again: 'Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same reasons. Where the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded on its own violation.' . . .

" 'The test', says Judge Duncan, in *Swan v. Scott* (11 Serg. & R. [Pa.] 164), 'whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot open his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant.' "

§ 748. In *Webster v. Howe Machine Company*<sup>1</sup> the facts were similar to those in the case of the *Credit Company v. Howe Machine Company* (§ 745 a), but in this case the plaintiff was not a holder for value; he discounted a bill accepted for accommodation by the Howe Company, but he applied the proceeds on a debt of the drawer to them, and did not discharge the debt or relinquish anything of value, and therefore the facts necessary to exclude the plea did not exist. No injustice could be done by allowing it.

*Party By Whom, pleaded no Benefit. Party Against Whom, had Notice*

A.'s land was sold for his debt to R. It was then bought by the C. bank, and by it sold to the E. bank, the latter purchase being *ultra vires* the charter. E. brought suit to recover the land from A., who was in possession, and the court said that, although A. had neither legal nor equitable right, it could not assist E. A. could plead *ultra vires*, although subsequent to bringing the action a statute was enacted ratifying the purchase by E.; the court saying, that the judicial department was independent of the legislative, and could brook no interference as to the decision of *existing* cases. A ratification before suit would have a different effect.<sup>2</sup>

<sup>1</sup> § 748. *Webster v. Howe Machine Co.*, 54 Conn. 394.

<sup>2</sup> *Thweatt v. Bank of Hopkinsville*, 81 Ky. 1.



*Party By Whom, no Benefit. Party Against Whom, Notice*

§ 749. The trustees of a savings institution subscribed for \$50,000 of the capital stock of the C. Company, and, the trustees having *no money to pay for it*, no funds in the treasury, the F. Company paid that amount to the C., taking the notes of the savings institution therefor, and a certificate of the stock in the F.'s own name as collateral. *Held*, that the subscription was *ultra vires*; that the F. was not a *bona fide* holder of commercial paper; and that the *savings institution, having received no benefit from the transaction, was not estopped to set up the defence of ultra vires*.<sup>1</sup> The trustees in this case had no power to purchase *on credit* property of any kind not needed for immediate use. One who *knowingly* takes as collateral security drafts of a national bank drawn *for the accommodation* of a customer, cannot recover in a suit against the bank in the hands of a receiver.<sup>2</sup>

*Notice. Real Party for Whom the Plea is made in this Case has a Superior Equity*

(a) Under the Tennessee Act of 1860, modifying the Tennessee Code, §§ 1814, 1817, holders of bank notes are presumed to have notice of all that appears on their face, and in the charters and laws under which the banks were organized. As *between the creditors* of an insolvent bank, those whose debts were created under the lawful power given by the charter *must be preferred* to those who *claim under a contract* that the bank under its charter had no power to make. In such case the bank is not estopped from denying the illegality or want of power to make the contract.<sup>3</sup>

§ 750. The plea cannot be set up for his own sake by one who has received and retained a benefit under a transaction not *malum in se* nor expressly void; nor in case of violation of a statutory provision when it is clear that the legislative intention was not to render transactions void because of such violation, but only to subject one or other party to a penalty or forfeiture.<sup>0</sup> The two principles are so linked in the cases that we will illustrate them together.

<sup>1</sup> § 749. *Franklin Company v. Lewiston Inst. for Savings*, 68 Me. 43.

<sup>2</sup> *Johnston v. Charlottesville National Bank*, 3 Hughes 657.

<sup>3</sup> *Bank of Chattanooga v. Bank of Memphis*, 9 Heisk. (Tenn.) 408.

<sup>0</sup> § 750. For complete statement, see §§ 733, 734 a, 735.

*Ultra Vires Loan*

One who has borrowed money from the bank cannot, after he has thus received the benefit of the contract, repudiate the obligation which it imposes upon himself, on the ground that the bank in making the loan exceeded its corporate powers, or acted otherwise improperly or illegally; <sup>1</sup> neither on the ground of any original informality or irregularity in the formation of the company under the law of its corporate existence.<sup>2</sup> Efforts of this nature to avoid the performance of their undertakings are usually based by debtors upon the infringement of clauses in the charter or organic law, which are so phrased or relate to such matters that the courts regard them as directory merely. These usually relate to the number of directors who shall have authority to make the loan; to the absolute amount, or the proportion of the capital stock, which shall not be exceeded in any individual loan; to the amount or kind of the security to be taken, or to the manner in which it shall be taken; and other like concerns. The breach of these and similar provisions may subject the corporation to penalties at the process of the State authorities, but it does not avoid the contract which it affects.<sup>3</sup>

*Taking Interest beyond Charter Limit*

It has been urged, that if the bank is prohibited from entering into any contract whereby it is to receive more than a certain specified rate of interest, then any contract which it undertakes to enter into, in contravention of this rule, must be void, as being one which the corporation is absolutely forbidden, and therefore

<sup>1</sup> *Parish v. Wheeler*, 22 N. Y. 494; *Smith v. Bank of the State*, 18 Ind. 327; *Bradley v. Same*, 20 *id.*, 528; *Bank of Middlebury v. Bingham*, 33 Vt. 621; *Planters' Bank v. Sharp*, 4 Sm. & Mar. (Miss.) 75; *Shoemaker v. National Mechanics' Bank*, 2 Abb. (U. S.) 416; *Stewart v. National Union Bank*, *id.*, 424; *Elder v. First National Bank of Ottawa*, 12 Kan. 238. See *Allen v. First National Bank of Xenia*, 23 Ohio St. 97; *First National Bank v. Messner*, 25 N. D. 263, 141 N. W. 999 (1913); *First National Bank v. Goodhue*, 120 Minn. 362, 139 N. W. 599, 43 L. R. A. (n. s.) 84 (1913).

<sup>2</sup> *Allison v. Hubbell*, 17 Ind. 559; *Southern Bank v. Williams*, 25 Ga. 534.

<sup>3</sup> See the cases cited in the two preceding notes; also *Moreland v. State Bank*, 1 Breese (Ill.) 203; *Bond v. Bank of Georgia*, 2 Kelly (Ga.) 92; *Bates v. State Bank*, 2 Ala. 451; also the same subject in the chapter on National Banks.

is absolutely powerless, to make. But though this view seems in a measure plausible, yet it has not been sustained by the best authorities. *Fleckner v. The Bank of the United States*<sup>4</sup> is a leading case on the subject, and the reasoning of Mr. Justice Story therein is satisfactory. The act of incorporation said, "Nor shall it (the bank) take more than at the rate of six per centum per annum for or upon its loans or discounts." Having first shown that the holding back of the amount of interest at the time of lending the money was not to be considered an infringement of this provision, Judge Story proceeded to say: "If indeed the law were otherwise, it would not follow that the transfer to the bank of the present note would be void, so that the maker of the note could set it up in his defence. The statutes of usury of the States, as well as of England, contain an express provision, that usurious contracts shall be void; and without such an enactment the contract would be valid, at least in respect to persons who were strangers to the usury. The taking of interest by the bank beyond the sum authorized by the charter would doubtless be a violation of its charter, for which a remedy might be applied by the government; but as the Act of Congress does not declare that it shall avoid the contract, it is not perceived how the original defendant could avail himself of this ground to defeat a recovery." Such a clause in the incorporating act would seem therefore to be directory merely. Infringement of it may subject the bank to proceedings, perhaps for the forfeiture of its charter, by the proper governmental authorities. But the contract itself, which is tainted with the disobedience, will not be void *in toto*, since the law, in order to have this effect, should have expressly so declared. It may be stated, as a rule of interpretation of such interest clauses in incorporating laws, that they will be construed in accordance with the analogy of decisions rendered under statutes of usury, similarly phrased. If the language expressly declares what shall be the effect of taking an illegal rate of interest, the matter is, of course, thereby put beyond the possibility of discussion. But if the language is simply confined to the expression of the prohibition, stating what "shall not" be done, without more, then the law asserted by Judge Story must be regarded as established. Indeed, very little desire to depart from it has ever been manifested.<sup>5</sup>

<sup>4</sup> *Fleckner v. The Bank of United States*, 8 Wheat. 338, 5 L. ed. 631.

<sup>5</sup> See also *Bank of United States v. Waggener*, 9 Pet. 399, 9 L. ed. 171;

*Distinction between reserving and taking Interest*

The cited case, *Bank of United States v. Waggener*, draws a fine distinction in phraseology, which ought, perhaps, to be noticed in this connection. The cause is first reported in 2 Pet. 527, 7 L. ed. 508 (under the name of *Bank of United States v. Owens*), and there, in respect to interest, the word "reserving" is declared to be included in the word "taking." So that whatever consequences are declared to attach to the "taking" illegal interest must attach likewise to the "reserving" it. But in the second decision the court reverse this conclusion, and declare that reservation is quite a different thing from a taking, and may entail entirely different results in its effect upon the contract. If the statute enacts that "reserving" shall avoid the transaction, it does not therefore follow that "taking" will also avoid it; and *vice versa*. The point is certainly a very subtle one, but it is carefully defined and strongly asserted by the court. It introduces another element of complication into a matter which certainly needed no such addition to its former difficulties.

A bank receiving the benefit of a contract cannot set up the plea of *ultra vires*.<sup>6</sup>

Real estate securities taken by a national bank in violation of the law are not void, but only voidable; the sovereign alone can object.<sup>7</sup>

(a) The prohibition in the Maine Revised Statutes, c. 47, § 15, against discounts by a bank of paper not having at least two names thereto, is intended for the security of the stockholders, and not

*Bandel v. Isaac*, 13 Md. 202; *Farmers' Bank v. Burchard*, 33 Vt. 346; *Rock River Bank v. Sherwood*, 10 Wis. 230; *Bank of Middlebury v. Bingham*, 33 Vt. 621; *Planters' Bank v. Sharp*, 4 Sm. & Mar. (Miss.) 75; *Farmers & Traders' Bank v. Harrison*, 57 Mo. 503. See also *Orr v. Lacey*, 2 Dougl. (Mich.) 252. But in examining all the cases special attention must be paid to the precise wording of the enactments under which they arise.

<sup>6</sup> *Ward v. Johnson*, 95 Ill. 240. See also 95 Ill. 215. *Blanchard v. Commercial Bank*, 75 Fed. 249 (1896); *Church v. Johnson*, 93 Iowa 544, 61 N. W. 916; *Kennedy v. Savings Bank*, 101 Cal. 495, 35 Pac. 1039; *Williams v. American National Bank*, 85 Fed. 376; *Crowder State Bank v. Aetna Powder Co.*, 41 Okla. 394, 138 Pac. 392 (1914); *Equitable Trust Co. v. National Bank*, 211 Fed. 688 (1914).

<sup>7</sup> *Warner v. De Witt County National Bank*, 4 Ill. App. 305 (1879); following *Union National Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *First National Bank v. Messner*, 25 N. D. 263, 141 N. W. 999 (1913); *Kerfoot v. Farmers' etc. Bank*, 218 U. S. 281, 54 L. ed. 1042, 31 Sup. Ct. 14 (1910).

for the benefit of one who borrows on such paper. It was meant to protect the shareholders from the carelessness of directors, and not to punish the innocent stockholders by relieving debtors from their just obligations to the bank.<sup>8</sup> So § 91, prohibiting savings banks from loaning money on security of names alone, is directory merely, for the protection of depositors, and does not prevent the bank from enforcing a note brought in violation of the provision.<sup>9</sup>

§ 751. A savings bank's discounting a note *ultra vires* is no defence to its suit on the note.<sup>1</sup> We give the substance of a very instructive case<sup>2</sup> in Maryland: —

“The rule of law is well settled that no action will lie to enforce a contract *malum in se*, nor, if executed, to recover money paid under it. In all such cases, the maxims, *Ex turpi causa non oritur actio*, and *In pari delicto potior est conditio defendentis et possidentis*, apply. In *Williams v. Headley* (8 East, 378), where an action was brought to recover money which had been paid by the plaintiff to the defendant to compromise a *qui tam* action brought by the defendant against the plaintiff, contrary to the provisions of a certain statute, it was held that the principle *in pari delicto* did not apply, because it was the purpose of the statute to punish the party who sues in order to extort money, and not the person who might be the victim of such extortion. This appears, said Lord Ellenborough, ‘to have been the *true sense* and *intention* of the legislature.’ Whether the action was maintained in these cases upon the ground that the principle of *pari delicto* did not apply, because the contracts were prohibited by statutes passed for the purpose of preventing one set of men from taking advantage of the necessities of others, or upon the broader ground taken in some of the American cases, that the statutes *designated the criminal by prescribing punishment against one party to the contract only*, is, in our view, and for the purposes for which they are referred to, quite immaterial. They prove conclusively that one common consequence does not attach to every contract made in violation of positive law, and, further than this, that in determining the question as to whether the maxim of *pari delicto* will operate as a bar to relief, courts will look to the statute itself, — the object and pur-

<sup>8</sup> *Roberts v. Lane*, 64 Me. 108 (1874).

<sup>9</sup> *Farmington Savings Bank v. Fall*, 71 Me. 49.

<sup>1</sup> § 751. *United German Bank v. Katz*, 57 Md. 128.

<sup>2</sup> *Lester & Wife v. Howard Bank*, 33 Md. 562.

poses for which it was passed,—in order to ascertain, in the language of Lord Ellenborough, ‘the true sense and intention of the legislature.’ And accordingly, in *Harris v. Runnels* (12 How. 80, 13 L. ed. 901), the Supreme Court, while acknowledging, as a general rule, that contracts made in contravention of statutory law are void, admit that the rule is subject to many exceptions, made upon distinctions very difficult to be understood consistently with the rule, ‘so much so’, say the court, ‘that we have concluded before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty only for doing a thing which it forbids, that *the statute must be examined as a whole to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not so to be.* In other words, whatever may be the structure of the statute in respect of prohibition and penalty, or penalty alone, that it is not to be taken as granted that the legislature meant that contracts in contravention of it were to be void, in the sense that they were not to be enforced in a court of justice. In this way the principle of the rule is admitted without at all lessening its force, though its absolute and unconditional application to every case is denied.’ The court further add, that ‘*when the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void.*’ ”

#### *Benefit received, and Legislative Intent*

§ 752. In an early case<sup>1</sup> the company capital was required by the charter to be paid at a certain time, and invested in a specified manner. Instead of conforming to the law, the company took the promissory notes of stockholders. In suit on a note against a stockholder, the court said, that for such misbehavior the government might seize the franchise, but it did not lie in the mouth of the stockholder and maker of the note to raise the objection of *ultra vires*, for as between him and the company the note was on good consideration.<sup>1</sup>

Again, in Massachusetts, a company sold goods to one Dewey. On suing for the price, D. pleaded that the sale was *ultra vires*. Parker, C. J., said that the government only could take advantage of that fact.<sup>2</sup>

<sup>1</sup> § 752. *Little v. O'Brien*, 9 Mass. 426.

<sup>2</sup> *Chester Glass Co. v. Dewey*, 16 Mass. 94.

Minnesota formerly held that a note *purchased* by a State or national bank could not be recovered on.<sup>3</sup> As to national banks, this position has been overruled to conform to the principles laid down by the United States Supreme Court in *National Bank v. Whitney* (§ 754).<sup>4</sup>

In a New Hampshire case the court said: "The doctrine of *ultra vires* is not usually applied where the party setting it up has received a benefit from the unempowered and unlawful act relied on as a defence. *Rich v. Errol*, 51 N. H. 350, 354; *West v. Errol*, 58 N. H. 233; *United States v. State Bank*, 96 U. S. 30, 24 L. ed. 647; *Gold Mining Co. v. National Bank*, 96 U. S. 640, 24 L. ed. 648; *National Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *National Bank v. Whitney*, 103 U. S. 99, 26 L. ed. 443. The defendants received a tract of land which the plaintiff conveyed, relying for payment of the consideration on the guaranty of the defendants. The guaranty, the conveyance, and the pledge of the note and mortgage, were parts of the same transaction, and though the land was not received directly from the plaintiff, it was the false guaranty which induced and made possible the conveyance, and which enabled the bank to collect the overdraft of Lamprey. It was a benefit received from the guaranty, and the defendants cannot be permitted to repudiate the unauthorized contract and retain the fruits of it. If the guaranty is denied, the benefit must be restored. The plaintiff cannot recover upon the guaranty. If he desires, he may amend his declaration by adding an appropriate count for the recovery of the land, or its value, if sold."<sup>5</sup>

§ 753. A national bank discounting a note at an illegal rate does not prevent its recovery of the full amount of principal and interest due thereon. Only the party with whom the bank had the usurious transaction can recover, under U. S. Rev. Sts., §§ 5197, 5198. The maker of a valid note cannot avail himself of *ultra vires* in the consideration.

When a national bank violates a provision to which the law attaches forfeiture of franchise or a penalty, only the Government through the Comptroller can take advantage of it. Everywhere a bank is held to recover money loaned on a usurious contract,

<sup>3</sup> See § 73.

<sup>4</sup> *Merchants' National Bank v. Hanson*, 33 Min. 40, 21 N. W. 849.

<sup>5</sup> *Norton v. Bank*, 61 N. H. 592; *Mutual Trust Co. v. Stern*, 235 Pa. St. 202, 83 Atl. 614 (1912); *First National Bank v. American National Bank*, 173 Mo. 153, 72 S. W. 1059 (1903).

though the interest is forfeited.<sup>1</sup> A national bank can recover money loaned beyond the lawful limit of one tenth of its capital paid; the contract is not void, but may be enforced.<sup>2</sup> "The rule is not for the benefit of either party to the illegal contract, but is based on public policy." It is to be noted that this broad ground would apply to all cases *in pari delicto*, and that the real ground of the case is that the law will not allow a party to retain a benefit arising from a transaction, and give no equivalent, unless the contract is one with which the courts cannot interfere at all, being expressly made void, or against morality or public policy, and then, when the parties are really *in pari delicto*, the law will refuse to aid either to get out of trouble he has got himself into by violating the law.

### *Violation of Law in taking Real Estate Security*

§ 754. A national bank can, against the mortgagor and parties claiming under him with notice, enforce a mortgage of lands executed to it as collateral security for his then existing indebtedness to it, and such as he might thereafter incur.<sup>1</sup>

### *Excessive Loan*

Rev. Sts. U. S. § 5200, providing that the amount for which any one individual or firm shall be indebted to a national bank shall not exceed a certain sum, when such a bank violates the provision by lending to one person an amount in excess of the limit, such person cannot set up the violation of the statute as a defence to his liability on the note. If a penalty is to be enforced against the bank, it can be done only at the instance of the Government. A contract entered into by the bank in violation of this section is not void. The true rule is, that, if the bank is to be punished for a violation of the law, the Government must enforce the penalty, and not an individual. The banking law, when fully examined, does not make the contract entered into in violation of § 5200 of the Revised Statutes void, and the stockholders are not to suffer

<sup>1</sup> § 753. *Stephens v. Monongahela National Bank*, 88 Pa. St. 157; *Richeson v. National Bank*, 96 Ark. 594, 132 S. W. 913 (1910).

<sup>2</sup> *Gold Mining Co. v. National Bank*, 96 U. S. 640, 24 L. ed. 648; *Richeson v. National Bank*, 96 Ark. 594, 132 S. W. 913 (1910).

<sup>1</sup> § 754. *National Bank v. Whitney*, 103 U. S. 99, 26 L. ed. 443; *Schuyler National Bank v. Gadsden*, 191 U. S. 451, 48 L. ed. 258, 24 Sup. Ct. 129 (1903).



when such a claim is made, under the circumstances suggested in the record.<sup>2</sup>

The United States Supreme Court have decided,<sup>3</sup> on the strongest reasoning that can be brought to bear in favor of excluding the plea of *ultra vires*, that a national bank may take real estate security for a concurrent loan, or future advances, and can enforce the deed of trust, or foreclose the mortgage, with the aid of a court of law, and no one can object but the United States. In *Union National Bank v. Matthews*, the court said :—

“ Here the bank never had any title, legal or equitable, to the real estate in question. It may acquire a title by purchasing at a sale under the deed of trust ; but that has not yet occurred, and never may. § 5137 has then no direct application to the case. It is only material as throwing light upon the point to be considered in the preceding section. Except for that purpose, it may be laid out of view. § 5136 *does not, in terms, prohibit a loan on real estate, but the implication to that effect is clear.* What is so implied is as effectual as if it were expressed. As the transaction is disclosed in the record, the loan was made upon the note as well as the deed of trust. *Non constat*, that the maker who executed the deed would not have been deemed abundantly sufficient without the further security. The deed, as a mortgage would have been, was an incident to the note, and a right to the benefit of the deed, whether mentioned or delivered or not, when the note was assigned, would have passed with the note to the transferee of the latter. The object of the restrictions was obviously three-fold. It was to keep the capital of the banks flowing in the daily channels of commerce ; to deter them from embarking in hazardous real estate speculations ; and to prevent the accumulation of large masses of such property in their hands, to be held, as it were, in mortmain. The intent, not the letter, of the statute, constitutes the law. A court of equity is always reluctant in the last degree to make a decree which will effect a forfeiture. The bank parted with its money in good faith. Its garments are unspotted. Under

<sup>2</sup> *Wyman v. Citizens' National Bank*, 29 Fed. 734.

<sup>3</sup> *Union National Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188 ; *Fortier v. New Orleans National Bank*, 112 U. S. 439, 28 L. ed. 764, 5 Sup. Ct. 234.

A debt incurred by a national bank beyond its paid up capital in violation of R. S. § 5202 is not therefore void if the bank has received and retained the consideration. *Weber v. Spokane National Bank*, 64 Fed. 208.

these circumstances, the defence of *ultra vires*, if it can be made, does not address itself favorably to the mind of the Chancellor. We find nothing in the record touching the deed of trust which, in our judgment, brings it within the letter or the meaning of the prohibitions relied upon by the counsel for the defendant in error. In the *First National Bank of Fort Dodge v. Haire and others*, (36 Iowa 443,) the bank refused to discount a note for a firm, but agreed that one of the partners might execute a note to the other, that the payee should indorse it, that the bank should discount it, and that the maker should indemnify the indorser by a bond and mortgage upon sufficient real estate, executed for that purpose, with a stipulation that, in default of due payment of the note, the bond and mortgage should inure to the benefit of the bank. The arrangement was carried out. The note was not paid. The maker and indorser failed and became bankrupt. The bank filed a bill to foreclose. The same defence was set up as here. In disposing of this point, the Supreme Court of the State said, 'Every loan or discount by a bank is made in good faith, in reliance, by way of security, upon the real or personal property of the obligors, *and unless the title by mortgage or conveyance is taken to the bank directly, for its use, the case is not within the prohibition of the statute.* The fact that the title or security may inure indirectly to the security and benefit of the bank will not vitiate the transaction. Some of the cases upon quite analogous statutes go much further than this. *Silver Lake Bank v. North*, 4 J. C. R. (N. Y.) 370.' When a statute imposes a penalty on an officer for solemnizing a marriage under certain circumstances, but does not declare the marriage void, the marriage is valid; but the penalty attaches to the officer who did the prohibited act. *Milford v. Worcester*, 7 Mass. 48; *Parton v. Hervey*, 1 Gray (Mass.) 119; *King v. Birmingham*, 8 Barn. & Cr. 29. Where a bank is limited by its charter to a specified rate of interest, but no penal consequence is denounced for taking more, it has been held that a contract for more is not wholly void. *Planters Bank v. Sharp et al.*, 12 Miss. 75; *Grand Gulf Bank v. Archer et al.*, 16 *id.*, 151; *Rock River Bank v. Sherwood*, 10 Wis. 230. The charter of a savings institution required that its funds should be invested in or loaned on public 'stocks or private mortgages, etc.' A loan was made, and a note taken, secured by a pledge of worthless bank stock. The borrower sought to enjoin the collection of the note, upon the ground that the transaction was forbidden by the charter, and therefore void.

The court held the borrower bound, and, upon a counter claim, adjudged that he should pay the amount of the loan with interest. *Mott v. United States Trust Co.*, 19 Barb. (N. Y.) 568. Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose. *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 313; *Goundie v. Northampton Water Co.*, 7 Pa. St. 233; *Runyan v. Coster*, 14 Pet. 122, 10 L. ed. 382; *The Banks v. Poitiaux*, 3 Rand. (Va.) 136; *McIndoe v. City of St. Louis*, 10 Mo. 577. See also *Gold Mining Co. v. National Bank*, 96 U. S. 640, 24 L. ed. 648. It would be in the *highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains. We cannot believe it was meant that stockholders, and perhaps depositors and other creditors, should be punished and the borrower rewarded*, by giving success to this defence whenever the offensive fact shall occur. The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other, contemplated by Congress. That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the government."

§ 755. The only penalty for violating § 5198 is the loss of interest; the note is not void, though a State law may declare that usurious paper shall be entirely null and void.<sup>1</sup> The question of *ultra vires* in the case of a national bank is between the Federal Government and the bank exclusively, and cannot be inquired into in a suit between the parties to the transaction.<sup>2</sup> This language is rather sweeping, and must be viewed as referring to the facts of the case. A by-law prohibiting a transfer of national bank stock while the holder is indebted to the bank is void, under § 5201 of the Revised Statutes, forbidding loans on security of their own stock, and certainly would not need a suit by the Government before the courts would refuse it support, and other cases may easily be added.<sup>3</sup>

<sup>1</sup> § 755. *Farmers & Mechanics' Bank v. Dearing*, 91 U. S. 29, 23 L. ed. 196.

<sup>2</sup> *Bank v. Elmore*, 9 Rep. 110 (Iowa).

<sup>3</sup> *Fleckheimer v. National Exchange Bank of Norfolk*, 79 Va. 80.

*Benefit Retained*

(a) A bank received a deposit of \$3000 under a contract in violation of its organic law, but made by the cashier in pursuance of orders from the directors, and Pennsylvania *held*, that, as between the bank and the contracting party suing to recover the deposit, the bank could not take advantage of the *ultra vires* character of the contract.<sup>4</sup>

The New York Savings Bank law limits the amount of an individual deposit to \$3000, and a deposit in excess of this may be recovered by the depositor without interest.<sup>4a</sup>

(b) Suit was brought to recover money loaned by a bank upon certain drafts which were dishonored. The defendants answered, that the bank, in advancing the money, violated its charter and exceeded its powers; that it was unlawfully carrying on the business of banking with the funds of depositors held by it in trust and for other purposes specified in its charter; and therefore the plaintiff had no right of action. *Held*, that under the charter the bank was a trustee for all funds deposited, and the moneys deposited were trust funds; that, although the transaction was unlawful and unauthorized, and subjected the bank to be proceeded against as for a forfeiture of its franchise, it did not lie with one who had thus obtained its funds and impaired the security of its depositors and the public to consummate a fraud against them by such a plea.<sup>5</sup>

§ 756. **The True Distinction.** — One of the most interesting cases in the books on the subject of *ultra vires* is *Bissel v. Michigan*

<sup>4</sup> *Hagerstown Bank v. London Savings Fund Soc.*, 3 Grant (Pa.) 135.

Even though a contract of guaranty may be *ultra vires* if the bank has received money from the transaction, the contract may be ignored and the money recovered under an implied contract. *Citizens' Central National Bank v. Appleton*, 216 U. S. 196, 54 L. ed. 443, 30 Sup. Ct. 364 (1910); and where a bank has undertaken to run a creamery and has in its possession money which is the proceeds of butter made from milk furnished by innocent parties, it may be recovered from the bank even though the contract is *ultra vires* under U. S. Rev. Sts. § 5133-5136; *Rankin v. Emigh*, 218 U. S. 27, 54 L. ed. 915, 30 Sup. Ct. 672 (1910).

One may recover from a bank money loaned under a void contract. *Union National Bank v. Lyons*, 220 Mo. 538, 119 S. W. 540 (1909). But one who makes a loan to a bank contrary to statutory law is not allowed to share with other lawful creditors when the bank becomes insolvent. *State v. Corning State Sav. Bank*, 13 Iowa 79, 113 N. W. 500 (1907).

<sup>4a</sup> *Taylor v. Empire State Savings Bank*, 66 Hun (N. Y.) 538.

<sup>5</sup> *Allen v. Freedman's S. & T. Co.*, 14 Fla. 418.

Southern Railroad Co.<sup>1</sup> Two corporations, chartered respectively by Michigan and Indiana, had each power to build and operate a road in its own State. They united in the business of transferring passengers over a third road in Illinois. One of these passengers (D.) was hurt by an accident on the latter road, resulting from the negligence of the employees of this *ultra vires* combination. It was admitted that the business was *ultra vires*. The court was not in unison. Comstock said that D. could recover in *contract*, for the plea of *ultra vires* must not be admitted where its allowance would be a greater injustice to innocent parties than the breach of trust is to the shareholders. A corporation must be held bound by its acts, when to repudiate them would be a manifest wrong to others. *Ultra vires* does not mean that the company *did* not contract to carry D., but that as to the shareholders and as to the government it *ought* not to have done it.

Now it is perfectly clear that the decision in this case resulted in substantial justice. A company receiving the benefit of a business should not be allowed to take advantage of its own wrong to escape the liabilities of the business. By its *ultra vires* acts, it wronged the public of which D. was (perhaps) a part; shall it escape liability to D. for an injury done to him because it has previously done him another injury? But though in substance right I am compelled to agree with the dissent of Selden: "If anything is settled it is that the assumption of any unauthorized power by a corporation is a violation of public policy and public right, and therefore illegal and void; the company then had no right to contract, and there could not be a valid contract under such circumstances; yet the company must be held liable to D., just as any railroad is liable for a negligent injury to one who is riding without a contract."

In other words, the court should do justice on the facts of the case, sustaining suit for the tort, or for breach of the contract implied by law on the circumstances. But the law should avoid the appearance of evil, and neither in fact nor in terms, sustain its own violation. It should be consistent, and not stultify itself by saying, "I, the sovereign, will enforce this contract (although I have forbidden it), until I, the sovereign shall object to it (although I have already objected decidedly)." Of course, these remarks have no application to cases which come within the principle of (3) alone. If the legislature had distinctly said,

<sup>1</sup> § 756. *Bissell v. Michigan Southern Railroad Co.*, 22 N. Y. 258.

“ I forbid this act under penalty, but think it best, for the stability of mercantile affairs, that among private persons the act when done should be sustained, and I trust entirely to my own direct action in the way of penalty or forfeiture ”, the courts have nothing to do but obey ; and if, though the legislature has not in terms said the contract shall not be void, but still it is manifest that their clear intent and plain justice could not be fulfilled by holding the contract void, and proceeding on the implied contracts, then also the court cannot do otherwise than refuse to listen to the plea of *ultra vires*. And it is the difficulty of deciding as to what is the legislative intent which has produced much of the conflict in this branch of the law. In all other cases the contract of the parties should be held no contract ; acting *ultra vires* is not to be recognized as acting at all, but the state of facts resulting should be inquired into, and substantial justice done, upon the principles of law and equity.

In this particular case, the two paths lead to the same house, but in some cases the practical result of the two modes of thought is very different. For illustration of this in cases which do not involve (like this one) a tort as well as a breach of contract, see §§ 743, 747.

§ 757. In the following Cases, the True Distinction seems to be recognized. N. H., Mass., N. Y., U. S. — A savings bank, having received special deposits out of its ordinary course of business, and appropriated them to its own use, is liable to pay their amount, and to that extent is estopped to claim that the receiving was not authorized by its charter.<sup>1</sup>

In Slater Woollen Co. v. Lamb, the contract sued on was not *ultra vires*. That fact being decisive of the case, the further suggestion in the opinion, “ Besides, the defendant cannot refuse payment on this ground, but the legislature may enforce the prohibition by causing the charter to be revoked when they shall determine that it has been abused,” was, as has been since pointed out, wholly *obiter dictum*. But the following words from that case are of value here : “ There is a distinction between a corporation making a contract in excess of its powers, and making a contract which it is prohibited by statute from making, or which is against public policy or sound morals ; and there is also a distinction between suing for breach of an executory contract, and suing to

<sup>1</sup> § 757. Cogswell v. Rockingham Ten Cents Savings Bank, 59 N. H. 43.

recover the value of property which has been received and retained by the defendant under a contract executed on the part of the plaintiff." <sup>1a</sup>

In *Tracy v. Talmage*, President, etc.,<sup>2</sup> the plaintiff sold stocks to the bank, and received in payment notes of a description which the law prohibited the bank from issuing. He was considered to be so far affected with a knowledge of the law that he could not recover on the illegal notes. But it was held that he was not *in pari delicto* with the bank in any such sense as to prevent him from holding the bank liable to reimburse to him the value of the stocks sold, either in *quantum meruit* or *assumpsit*. In another case,<sup>3</sup> a loan was made in form to the president, who gave his individual note for the amount, but with the indorsement of the bank. It was *held*, that, if the loan was in fact for the benefit of the corporation, or if the lender was made to believe it to be so, and if it was within the scope of the business of the corporation, but this unusual process was resorted to solely to avoid a technical legal restriction which prevented the lender from lending directly to the corporation, then the corporation would be liable on the indorsement.<sup>3</sup> Otherwise only for the money received and retained by it.

The true distinction seems also to be recognized in *Merchants' Bank v. State Bank*, 10 Wall. 604, 19 L. ed. 1008. And see §§ 743, 747.

§ 758. **Ultra Vires aside from the Matter in Litigation.**<sup>0</sup> — When there is an *ultra vires* act entirely extrinsic to the transaction between the bank and D., and not the basis on which is built the validity of the said transaction, D. cannot avail himself of the fact. As if the bank has made *ultra vires* loans to others, or purchased real estate beyond its power, this can be no defence to D. in a suit for money the bank has loaned to him.

If the *ultra vires* act, though not a part of the immediate transaction with D., is the foundation upon which is built the validity

<sup>1a</sup> See *Fidelity etc. Co., v. National Bank*, 48 Tex. Civ. App. 301, 106 S. W. 782 (1908), citing cases and holding that there is a distinction between acts that are beyond the power of the bank for any purpose and under any circumstances and acts which are *ultra vires* by circumstances, or such as are beyond its authority for some purposes or under some circumstances, but are within its power under other circumstances or for other purposes.

<sup>2</sup> *Tracey v. Talmage*, 4 Kern. (N. Y.) 162.

<sup>3</sup> *Central Bank v. Empire Stone Dressing Co.*, 26 Barb. (N. Y.) 23.

<sup>0</sup> § 758. Expansion of § 726.

of such transaction, D. can or cannot raise the objection according to the principles above. If the effect of the *ultra vires* act is to deprive D. of the rights he would otherwise have, as if the bank attempts to create a lien on stock by an unauthorized by-law, and D. purchases stock (at least if he has no notice of the by-law), it will not be sustained against him.

So if a corporation exercises the power of eminent domain, it must be fully and actually authorized. It is not enough for it to be a *de facto* corporation to sustain the exercise of any *privilege*, or power which infringes on common rights. On the other hand,<sup>1</sup> where the *ultra vires* act does not tend to infringe on D.'s just rights, where D. has voluntarily entered into a transaction knowing of the act, or where the transaction between the bank and D. involves only such relations as may exist among private individuals, perfect justice can usually, if not always, be done to D. without reference to the *ultra vires*, and he will not be allowed to escape a just liability by pleading it. In transactions, therefore, which do not involve privilege, it is enough if the bank is a *de facto* corporation, and its failure to fulfil any condition of its existence, precedent or subsequent, will not be relevant in a private suit.

When a "charter has actually been granted to certain persons to act as a corporation, and they are actually in the possession and enjoyment of the corporate rights granted, such possession and enjoyment will be held valid against one who has dealt with them in their corporate character. Angell and Ames on Corporations, § 80. He cannot be permitted to prove, in a collateral proceeding, that a condition precedent to its full corporate existence has not been complied with. As against him, the charter and a use of rights claimed to have been conferred by it are sufficient. *When there is a de facto corporation, and the State does not interfere, its corporate existence and its ability to contract cannot be questioned in a suit brought upon an evidence of a debt given to it.* Commissioners v. Bolles, 4 Otto 104, 24 L. ed. 46. It is well settled that although a charter may be declared null and void by the proper authority, yet the violation thereof cannot be determined in a collateral suit. *Irvine v. Lumbermen's Bank*, 2 W. & S. (Pa.) 190."<sup>2</sup>

"All conditions precedent having been performed by the in-

<sup>1</sup> See Vermont case in § 728.

<sup>2</sup> *Spahr v. Farmers' Bank*, 94 Pa. St. 434.



corporators, it is simply out of all precedent for the appellant in a collateral proceeding like this, or in any other proceeding, to attempt to show that the corporation was a nullity, by showing that certain conditions subsequent had not been complied with. *The existence of a corporation once formed can only be called in question by a direct proceeding, and that, too, at the suit of the sovereign power, the State.* Nor are the breaches of conditions subsequent alleged by the appellant, such as a failure of the stockholders to pay up their subscription, the failure to hold elections to elect directors, and breaches of a similar character, sufficient grounds for the destruction of a corporate existence, even at the suit of the State, where a by-law, and of course where the law, provides that the directors named in the charter shall serve until their successors are elected and qualified as provided by the laws of the State. Mansf. Dig., § 5420; Commonwealth *ex rel.* Claghorn *v.* Cullen, 13 Pa. St. 133. Cahill *v.* Kalamazoo Mutual Ins. Co., 2 Douglas (Mich.) 124. . . . The contract of sale being otherwise fair and lawful, both parties having performed their respective parts, the plea of *ultra vires* cannot and ought not in equity and good conscience to avail anything. See Hitchcock *v.* Galveston, 96 U. S. 341, 24 L. ed. 659, and Union National Bank *v.* Mathews, 98 U. S. 621, 25 L. ed. 188.”<sup>3</sup>

*To exercise a privilege requires a corporation de jure*

“In order to sustain proceedings by which a body claims to be a corporation, and as such empowered to exercise the right of eminent domain, and under that right to take the property of a citizen, it is not sufficient that it be a corporation *de facto*. It must be a corporation *de jure*. Where the power is conferred upon a corporation duly formed, it will not be defeated simply because the corporation has done or omitted some act which may be a *cause* of forfeiture of its rights and franchises, for it rests with the State to determine whether such forfeiture will be enforced. *Judicial* proceedings are necessary to enforce such a forfeiture, and it may be waived. That was the point to which the opinion in the Matter of the Brooklyn, etc. Railroad Co., 72 N. Y. 245, cited by the appellant, was directed.”<sup>4</sup>

<sup>3</sup> Town of Searcy *v.* Yarnell, 47 Ark. 280.

<sup>4</sup> New York Cable Co. *v.* Mayor, etc. of New York, 104 N. Y. 43.

*Irregular Organization*

No irregularity in the original organization (though a cause of forfeiture) will relieve stockholders from their liability to redeem the circulating notes.<sup>5</sup>

§ 759. **Forfeiture.** — In considering this matter several questions arise.

First. Of what nature are the acts which constitute a cause of forfeiture? Where is the dead line? (A, below.)

Second. When an officer oversteps this line, will the Government hurl its thunderbolt at the bank? How are we to decide whether a given act is that of the bank or of the individual officer, as between the bank and the government? (B.)

Third. Does the occurrence of a cause of forfeiture itself produce the consequence, or must legal proceedings be instituted? (C.)

Fourth. When this malady attacks a bank, can it be cured? (D.)

§ 760. (A) **Causes of Forfeiture.** — It is a tacit condition of incorporation that the bank shall act up to the end or design of its creation, and for neglect or abuse of its franchises its charter may be declared forfeit.<sup>1</sup> The National Banking Law declares, that if the directors of a bank knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate, any of the provisions of the law under the title National Banks, its franchises *shall be forfeited*,<sup>2</sup> on suit by the Comptroller. The Massachusetts law is, that if a "bank has exceeded its powers, or failed to comply with any of the rules, restrictions, and conditions provided by law, its corporate franchise *may* be declared forfeited."<sup>3</sup>

*Common Law Rule*

The rule of the common law we believe to be, that if a bank, through its stockholders or directors, acting as a body, *knowingly* exceeds the authority of the bank, or violates any provision of law, or knowingly permits any agent to do the same, its charter *may*

<sup>5</sup> McDougald v. Bellamy, 18 Ga. 411.

<sup>1</sup> § 760. People v. Washington Bank, 6 Cow. (N. Y.) 211; People v. Bank of Niagara, *id.* 196; State Bank v. State, 1 Blackf. (Ind.) 279; Atchafalaya Bank v. Dawson, 13 La. 497; Hamtramck v. Bank, 2 Mo. 169; Commonwealth v. Commercial Bank of Pennsylvania, 28 Pa. St. 383.

<sup>2</sup> II. § 53, R. S. 5239.

<sup>3</sup> Mass. Rev. Laws c. 115 Sec. 108.

be declared forfeited, in the discretion of the court,<sup>4</sup> when suit is brought by the State for the purpose. The word *knowingly* of course refers only to matters of fact in this connection, for the law they are bound to know, and a violation of it through ignorance, not of fact, but of law, is no excuse. The knowledge may be either actual or constructive. (See chapter on Directors.) A substantial performance of conditions, precedent or subsequent, is all that is required.<sup>5</sup>

### *Mistake. Internal Ultra Vires*

Mistake alone, unless it renders the bank unable to go on with its business in safety to the community, would not at common law cause forfeiture. And any mere *internal violation* of law, which, though it infringes the right of stockholders or officers, does not have a directly mischievous effect upon the public, (as, for example, a by-law imposing unauthorized liabilities on stockholders, or unlawful elections or amotions from office, or disfranchisement without cause, or accepting accommodation paper), the courts will rather correct the wrong than declare a forfeiture which would punish still more the very ones whose rights have been violated, as well as the wrongdoers.

### *Non-user*

(a) *Entire discontinuance* of all business except *settling up* its affairs is a cause of forfeiture;<sup>6</sup> and, in general, total non-user<sup>6a</sup> is a cause of forfeiture, though the bank is not dissolved till it is so declared in a judicial proceeding, and, if it resumes business before suit is brought for this purpose, it will be a good defence. It has been said, that mere omission to exercise corporate powers disconnected with any acts does not cause forfeiture,<sup>7</sup> and this is

<sup>4</sup> Even if a sufficient cause to justify a forfeiture be shown to the court, still it is not imperative upon the court to decree forfeiture. Whether or not this shall be done is a question for the discretion of the court upon a consideration of all the circumstances. *State of Vermont v. Essex Bank*, 8 Vt. 489.

<sup>5</sup> *People v. Thompson*, 21 Wend. (N. Y.) 235; *Commonwealth v. Alleghany County*, 20 Pa. St. 185.

<sup>6</sup> *Jackson Marine Ins. Co. Matter*, 4 Sandf. Ch. (N. Y.) 550.

<sup>6a</sup> Noncommencement of business for two years is a cause of forfeiture. *Commonwealth v. Reliance Safe Deposit etc. Co.*, 242 Pa. St. 177, 88 Atl. 1004 (1913).

<sup>7</sup> *Attorney-General v. Bank of Niagara*, 1 Hopkins (N. Y.) 354.

always true of an omission to exercise a severable part of the franchise, unless it involves neglect of a duty made compulsory by law; but a total discontinuance or abandonment of business would probably always be considered a cause of forfeiture, unless the bank has shown its power and intent to resume by again beginning to do business, as noted above.

*Illegal Loans or Failure to make Statement. Fraud. Non-user. Misuser. Usury. Suspension of Specie Payment*

§ 761. Generally, it may be said<sup>\*</sup> that any violation, wilfully or knowingly committed, of any material direction or provision embodied in the law of the corporate existence, or any fraudulent or dishonest act or the occurrence of anything which shows that for any reason, whether of fault or misfortune, the bank is incompetent in any respect to perform safely and usefully any of its functions, will furnish sufficient ground for taking away the corporate franchise.<sup>1</sup> Specific cases which have arisen in various States may be given, by way of illustration, as follows: the making loans to the directors before the shareholders have passed by-laws concerning this matter;<sup>2</sup> refusal to transmit a statement of the condition of the bank, required by law to be made to a government official;<sup>3</sup> excessive loans to directors, though no by-law exists in reference thereto;<sup>3</sup> the making of a note to the bank, without consideration and merely colorable, which the bank receives and uses for the purpose of making its assets appear greater;<sup>4</sup> non-user or misuser of the franchise;<sup>5</sup> wilful taking of illegal interest.<sup>6</sup> Whether or not suspension of specie payments will work a forfeiture is a question which has in different States been differently decided.<sup>7</sup>

<sup>1</sup> § 761. See *State Bank v. State*, 1 Blackf. (Ind.) 270; *Montgomery Bank etc. Co. v. Walker*, 181 Ala. 368, 61 So. 951 (1913), insolvency.

<sup>2</sup> *Conant v. Seneca County Bank*, 1 Ohio St. 298.

<sup>3</sup> *State v. Some*, 5 Ohio St. 171.

<sup>4</sup> *Agricultural Bank v. Robinson*, 24 Me. 274.

<sup>5</sup> *People v. Hudson Bank*, 6 Cow. (N. Y.) 217; *Same v. Niagara Bank*, *id.* 196; *Commonwealth v. Reliance Safe Deposit etc. Co.*, 242 Pa. St. 177, 88 Atl. 1004 (1913).

<sup>6</sup> *Commonwealth v. Commercial Bank*, 28 Pa. St. 383; *Fleckner v. Bank of United States*, 8 Wheat. 338, 5 L. ed. 631. See *Wald v. Wheelon*, 27 N. D. 624, 147 N. W. 402 (1914), excessive loan.

<sup>7</sup> It will not in Ohio: *State v. Commercial Bank*, 10 Ohio 535. It will in Virginia: *Planters' Bank v. State*, 6 Sm. & Mar. (Miss.) 628; 7 *id.* 163; *Commercial Bank of Natchez v. State*, 6 *id.* 599. It will in South Carolina: *State v. Bank of Carolina*, 1 Speers 433. Apparently

Under the State laws of New York it was *held*, in 1826, that suspension of payment, even accompanied by insolvency, was not necessarily a cause of forfeiture, but that the same must be continuous. For how long a time it must continue, in the absence of a statutory limitation, was not declared, since in these cases it appeared that the banks had become solvent again, and resumed payment. Suspending payment was said to be sometimes a prudent and justifiable measure, consistent with the ultimate solvency of the bank; and that there must be a total non-user to be a ground of forfeiture.<sup>8</sup> So also in Virginia, it is a *quære*, in the cases cited in note 7, whether a merely temporary suspension would constitute a ground for forfeiture.

### *Failure to pay in Capital*

Where a banking corporation under the statute fails within the period of one year from its organization to pay up its entire capital stock in cash, its charter is liable to forfeiture.<sup>9</sup>

### *Withdrawal of Capital*

Where the organic law under which a bank is established requires a certain sum to be paid in, in cash, upon account of the capital stock, if this amount be paid in by the shareholders and then forthwith be in great part paid back again to them in the shape of loans made to them upon private security (*apparently*, in the cited case, upon security of their very shares in the bank), this constitutes such an obvious deviation from the intention of the statute as to justify proceedings for the forfeiture of the charter.<sup>10</sup>

### *A Single Wilful Neglect or Abuse. Mistake or Omission*

Though abuse, or wilful omission in a *single* instance, or any negligent act or omission in violation of an express requirement, is a cause of forfeiture, yet a *mistake*, or accidental negligence or omission, or discontinuance of a several part of the bank's fran-

also in Georgia and Mississippi: *Robinson v. Bank of Darien*, 18 Ga. 65; *Maury v. Ingraham*, 28 Miss. 171.

<sup>8</sup> *People v. Bank of Niagara*, 6 Cow. (N. Y.) 196; *Same v. Bank of Washington & Warren*, *id.* 211.

<sup>9</sup> *People ex rel. v. City Bank*, 7 Colo. 226; *Commonwealth v. Reliance Safe Deposit etc. Co.*, 242 Pa. St. 177, 88 Atl. 1004 (1913).

<sup>10</sup> *State of Vermont v. Essex Bank*, 8 Vt. 489.

chises, or any nonfeasance not of a mischievous tendency, nor contrary to particular requisition of charter, works no forfeiture.<sup>11</sup>

### *Insolvency*

Insolvency and assignment of its property, so as to disable the bank from continuing its business, is a cause for forfeiture on a *quo warranto*.<sup>12</sup>

### *Embezzling. Borrowing. Wrongful Issue or Agency*

Embezzling money deposited, going into debt beyond the prescribed limit,<sup>13</sup> issuing more bills than is lawful, or having an agency in another State to receive deposits in violation of the charter, is a cause of forfeiture.<sup>14</sup>

§ 762. (B) **The Line between Individual and Corporate Action in Relation to Forfeiture** is indicated in the National Banking Law, II. § 53. If the board of directors order, or *knowingly permit*, or ratify the act of an agent or officer, it is the act of the bank, and the burden of proof is on the prosecution to show that the act is a corporate, not an individual one. We will now notice these points somewhat more fully.

### *The Act must be that of the Bank*

(a) An act or omission, in order to furnish ground for proceedings to take away the corporate franchise, must be the act of the corporation itself. Cases might arise in which the act or omission of the shareholders, as a body, could have this effect. *Ordinarily, however, the law regards the board of directors as constituting the body corporate for all matters of this description.* The fault must accordingly be theirs, either directly or by legal implication. Otherwise, it will not be the act of the bank, and will not be a cause of forfeiture. Thus, if a cashier or teller, although acting within the scope of his allotted functions, commits a breach of the organic law, this fact alone is not sufficient to cause a forfeiture. On the contrary, it will be presumed that he alone and individually, of

<sup>11</sup> Bank Commissioners v. Bank of Buffalo, 6 Paige (N. Y.) 497; Paschall v. Whitsell, 11 Ala. 472.

<sup>12</sup> State v. Commercial Bank, 43 Sm. & Mar. (Miss.) 569; People v. Hudson Bank, 6 Cow. (N. Y.) 217; Bank Commissioners v. Bank of Brest, Harr. Ch. (Mich.) 112.

<sup>13</sup> Bank Commissioners v. Rhode Island Central Bank, 5 R. I. 12.

<sup>14</sup> People v. Oakland County Bank, 1 Doug. (Mich.) 291.

his own motion, is guilty of the misdoing. But, if the contrary be affirmatively shown, and if it be actually proved that the directors ordered, or knowingly permitted or ratified, the illegal act, then it remains no longer the act of the individual officer, but becomes the act of the bank, and as such furnishes ground for the process for disfranchisement. It is only when the act of the subordinate is rendered by the attendant circumstances, in the view of the law, the act of the principal, — that is to say, of the board of directors, or of the bank itself, — that the principal will be deprived of its corporate existence by reason of it.<sup>1</sup>

(b) The burden of proof has been already touched upon. The suit is in the nature of a criminal prosecution, and the burden is on the government to rebut the presumptions of the bank's innocence. To be sure, either the officer or the bank is guilty, but it is less to be presumed that a large body is guilty of violating the law, than that one man has transgressed; especially as in this case it is clear the officer has gone wrong as soon as the act is proved, whether the bank is in fault or not, so that the presumption of innocence stands clear and strong in favor of the bank; and though the facts that the officer acted ostensibly for the bank, or in the course of his employment, or that the bank has received benefit from the act, are to be considered, the mere fact of the difficulty of proving that the bank is involved should not shift the burden. For this would be overturning the principles of the law, and requiring every one suspected of being a criminal or violator of the law to establish his innocence, provided the circumstances indicate that it will be easier for him to do that than for the government to prove his guilt, and would have the court saying to those indicted, "See here, things are not clear, but look very suspicious for you in this case, and we cannot very easily find out the facts; now prove your innocence." If a ratification is relied upon, the burden is on the prosecution to show that the bank (board of directors, or body of stockholders), with full knowledge of the facts, acquiesced in and adopted the acts of its agent. It is not enough to show that the bank with proper diligence might have known the facts.<sup>2</sup>

**§ 763. (C) The Effect of the Occurrence of an Act by a Bank of such Nature as to subject it to Proceedings aimed at Forfeiture**

<sup>1</sup> § 762. *Clark v. Metropolitan Bank*, 3 Duer (N. Y.) 241; *State v. Commercial Bank*, 6 Sm. & Mar. (Miss.) 218.

<sup>2</sup> *Murray v. Nelson Lumber Co.*, 143 Mass. 251, 9 N. E. 634.

of its Charter, extends no further than this opening the door to direct suit by the Government;<sup>1</sup> such matter cannot be set up and tried in collateral proceedings. There must be direct process, instituted by the Government, in which the defence, excuse, or explanation of the bank will be heard, and the distinctive question will be judicially passed upon, free from the complication of any other parties, issues, or interests.<sup>2</sup>

Until forfeiture is judicially declared, the bank's power of doing business is not affected; unless of course the organic law declares that subsequent acts shall be void, or construction gives that meaning to the law, as perhaps, if the charter should declare that the estate or franchise should absolutely determine on happening of a cause of forfeiture. See § 764.

Power conferred on a corporation duly formed will not be defeated simply because the corporation has done or omitted some act which may be a cause of forfeiture of its rights and franchises; for it rests with the State to determine whether such forfeiture will be enforced;<sup>3</sup> and even in respect to parties to the very transaction that is unlawful, it is often the case that no effect is produced by the fact that the act was beyond the powers of the bank. No one can escape liability for money borrowed of the bank because the loan was in violation of law,<sup>4</sup> nor any other liability justly attaching. (See *Ultra vires*.) Even where proceedings for forfeiture of franchise are pending, the bank may continue to do business until the forfeiture is declared.<sup>4</sup>

§ 764. (D) **Cure of Forfeiture.** — A cause of forfeiture may be waived by legislative action,<sup>1</sup> unless the charter declares the franchise shall determine absolutely on failure to perform its conditions,<sup>2</sup> and perhaps even then.<sup>3</sup>

<sup>1</sup> § 763. *Dyer v. Walker*, 40 Pa. St. 157; *Silver Lake Bank v. North*, 4 Johns. (N. Y.) 370; *Banks v. Poitiaux*, 3 Rand. (Va.) 142; *Planters' Bank v. Bank of Alexandria*, 10 Gill & J. (Md.) 346.

<sup>2</sup> *Grand Gulf Bank v. Archer*, 8 Sm. & Mar. (Miss.) 151; *Receivers of Bank of Circleville v. Renick*, 15 Ohio 322.

<sup>3</sup> *New York Cable Co. v. Mayor, etc. of New York*, 104 N. Y. 43, 10 N. E. 332.

<sup>4</sup> *Stephens v. Monongahela National Bank*, 88 Pa. St. 157; and see *Ultra vires*, § 722.

<sup>1</sup> § 764. *Commercial Bank of Natchez v. State of Mississippi*, 6 Sm. & Mar. (Miss.) 622.

<sup>2</sup> *Quincy Canal v. Newcomb*, 7 Met. (Mass.) 277; *People v. Manhattan Co.*, 9 Wend. (N. Y.) 351.

<sup>3</sup> *People v. Oakland County Bank*, 1 Doug. (Mich.) 282.



## CHAPTER XLIII

### LEGISLATIVE CONTINUANCE OF CORPORATION

§ 765. THE corporation may be continued in existence by virtue of an act of legislature, equally whether the act is passed before or after the expiration of the charter limitation. The bank will be revived by the act passed after the expiration in every respect as the same corporation which it was before; and will be in respect affected by the break in continuity, except as to contracts such as official bonds that are bounded by the life of the charter. This is the unquestionable effect of a simple act of continuance or revival. But whether the act is in fact one of continuance and revival of the old corporation, or is the creation and institution of a new one, is a question of great importance. No general rule can be laid down for determining it, inasmuch as it depends in each case upon the intent of the legislators, as the same is judicially gathered and construed from the terms of the enactment. The statute will always be conclusive. The acts and conduct of the directors, which can possibly amount to nothing more than the expression of their construction of the act, will not be allowed to alter the true legal meaning and effect thereof, as the same shall appear to the judges. The enactment has either continued an old corporation, or it has made a new one. Whichever act it has done, it has done that act absolutely and irrevocably, and beyond the possibility of modification or change by the words or deeds of the directors, who hold their office under and in subjection to it. But there is an important distinction between the two cases; for, if there is a continuance, the corporation succeeds to both the rights and the liabilities existent at the time of the taking effect of the act. But if there is a new corporation, it succeeds neither to the rights nor to the liabilities of its predecessor, with which, and with the affairs, assets, and debts of which it has no more to do than if it were any other bank in the country. It

makes no difference that the name is the same, that the place of business is the same, that the officers and shareholders, or the majority of them, are the same. The combination of these elements proves nothing conclusively; for if the arbitrary statute has created a new corporation, new and therefore wholly independent it is and must be, however close and perfect may be the similarity between it and any predecessor. In such case, there is similarity only, and not identity. Indeed, the traits of similarity are not properly even competent evidence to prove identity. For whether or not there is identity is purely a question of statutory phraseology.<sup>1</sup>

<sup>1</sup> § 765. *Lincoln & Kennebec Bank v. Richardson*, 1 Greenl. (Me.) 79; *Foster v. Essex Bank*, 17 Mass. 479; *Bellows v. Hallowell & Augusta Bank*, 2 Mason 31; *Wyman v. Same*, 14 Mass. 58.

## CHAPTER XLIV

### DISSOLUTION

§ 766. A BANK may be dissolved by expiration of the charter, by judicial declaration of forfeiture, by legislative repeal of the charter, if power for that purpose is reserved, (but no rights or property acquired by a legitimate exercise of the franchises while they existed can be disturbed,<sup>1</sup>) and by voluntary dissolution or surrender of the charter.<sup>2</sup> Under the National Banking Laws, a bank may be closed by vote of the members owning two thirds of the stock. II. § 42.

Under the Massachusetts banking laws, the franchise may be surrendered by a majority of all the votes that the whole body of stockholders could cast if all were present;<sup>3</sup> the votes that a stockholder may cast depending somewhat on the amount of his stock. But in Massachusetts a corporation is continued as a body corporate for three years after dissolution from any cause, for the purpose of settling its concerns, and bringing and defending suits, etc., arising in the course of such settlement.<sup>4</sup>

When a bank goes into liquidation its power to bind its stockholders ceases, except in transactions implied in the duty of liquidation.<sup>5</sup> But the dissolution of a corporation in Georgia does not in any manner affect any collateral or ultimate or other liability incurred by any of its officers or members.<sup>6</sup> A bank may collect its debts even after it goes into liquidation;<sup>7</sup> and in Oklahoma

<sup>1</sup> § 766. *Commonwealth v. Essex Company*, 13 Gray (Mass.) 253.

<sup>2</sup> Statutes may provide for the dissolution of a bank. See *First State Bank v. Bank of Braggs*, 43 Okla. 342, 142 Pac. 1183 (1914). See also *Cartmell v. Commercial Bank etc. Co.*, 153 Ky. 798, 156 S. W. 1048 (1913), holding that the majority of directors of an insolvent bank may place the bank in the hands of the banking commissioner for liquidation.

<sup>3</sup> R. L. c. 115, §§ 115-118.

<sup>4</sup> R. L. c. 109, § 53.

<sup>5</sup> *Covell v. Fowler*, 144 Fed. 575 (1906).

<sup>6</sup> *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626 (1906).

<sup>7</sup> *Commercial Trust Co. v. Mallers*, 242 Ill. 50, 89 N. E. 661 (1909);

when a bank quits business without surrender or forfeiture of its charter the law will keep it alive for the purpose of collecting its assets, paying its obligations, suing and being sued, and will require its last officers to represent it as long as rights of third parties are undetermined.<sup>8</sup> The personal property of the corporation does not, in such cases, escheat to the state.<sup>9</sup>

When a stockholder under authority of statute applies to the Court for an order dissolving the corporation, the directors of the bank must be made parties to the proceedings;<sup>10</sup> and when the attorney-general brings an action to prohibit a bank, which has been reported by the bank examiner and commissioners to be unsafe, from doing business, as provided by statute, the state is a proper party plaintiff.<sup>11</sup>

Where the charter gives to the stockholders the right to control the liquidation of the bank, the officers of the bank, including the board of directors, are without authority to surrender such right, and the owners of three fourths of the stock represented at a meeting may vote for dissolution.<sup>12</sup>

*Lindemann v. Rusk*, 125 Wis. 210, 104 N. W. 119 (1905); *Ham v. Banque Ville Marie*, 22 R. I. 248, 47 Atl. 364 (1901). See *Wilson v. First State Bank*, 77 Kan. 589, 95 Pac. 404 (1908); *Saunders v. Mecklenburg Bank*, 112 Va. 443, 71 S. E. 714, 1913B Ann Cas. 982.

<sup>8</sup> *Overstreet etc. Improvement Co. v. Citizens' Bank*, 12 Okla. 383, 72 Pac. 379 (1903).

<sup>9</sup> *Lindemann v. Rusk*, 125 Wis. 210, 104 N. W. 119 (1905).

<sup>10</sup> *Golden v. District Court*, 31 Nev. 50, 101 Pac. 1021 (1909).

<sup>11</sup> *State v. State Bank etc. Co.*, 31 Nev. 456, 103 Pac. 407 (1909).

<sup>12</sup> *Dreifus v. Colonial Bank etc. Co.*, 123 La. 61, 48 So. 649 (1909).

## CHAPTER XLV

### LOAN, TRUST AND INVESTMENT COMPANIES

- § 767. Distinction between bank and trust company.
- § 768. Control and regulation.
- § 769. Incorporation and organization.
- § 770. Merger.
- § 771. Liability of stockholders.
- § 772. Officers and agents. Powers and duties.
  - 1. Directors.
  - 2. President.
  - 3. Vice-president.
  - 4. Manager of branch.
  - 5. Executive committee.
- § 773. Representations of officers and agents.
  - 1. In general.
  - 2. President.
  - 3. Treasurer.
  - 4. Director and manager of bond department.
  - 5. Secretary.
  - 6. Paying teller.
  - 7. Actuary.
- § 774. Knowledge of officers and agents.
  - 1. When not imputable to the company.
  - 2. When imputable to the company.
- § 775. Liabilities.
  - 1. Managing agents.
  - 2. Directors.
  - 3. Executive committee.
- § 776. Criminal liability.
  - 1. Intent.
  - 2. Indictments.
- § 777. Powers.
- § 778. Dissolution.

§ 767. **Distinction between Bank and Trust Company.** — The distinction between a bank and a trust company is well defined. The powers of the trust company depend upon the terms of its charter, of course, but they are not banking powers. The trust company, like the savings bank, pays interest upon deposits, but its deposits are strictly loans, not subject to check. It may

not issue its own notes for circulation, nor does it buy or sell exchange in the ordinary course of its dealings. In directions that are not akin to banking, its powers are much broader, and extend outside the monetary realm into real estate transactions, trusteeships, and the conduct of property interests of all kinds. The exercise by a trust company of some of the functions of a bank does not make the company a banking institution, nor lay its officers liable to prosecution for violating the banking laws.<sup>1</sup> A trust company is neither a national bank nor a state bank within the meaning of the laws of Massachusetts.<sup>2</sup> While it exercises some of the functions of banking it has a distinct class of powers granted to it which banks are not authorized to exercise at all.<sup>3</sup>

§ 768. **Control and Regulation.** — It is within the power of the legislature of the various states in enacting a general law for the creation, government and control of loan, trust and investment companies to prescribe rules and regulations under which their business shall be conducted.<sup>1</sup> It may provide for the publicity

<sup>1</sup> § 767. *Dietrich v. Rothenberger*, 25 Ky. L. 338, 75 S. W. 271 (1903), quoting from 3 Am. & Eng. Ency. of Law 791.

<sup>2</sup> *Nash v. Brown*, 165 Mass. 384, 43 N. E. 180 (1896).

<sup>3</sup> *State v. Reid*, 125 Mo. 43, 28 S. W. 172 (1894), citing *Mercantile National Bank v. New York*, 121 U. S. 138, 30 L. ed. 895, 7 Sup. Ct. 826. See also *Mulherin v. Kennedy*, 120 Ga. 1080, 48 S. E. 437 (1904).

<sup>1</sup> § 768. *State v. Twining*, 73 N. J. L. 3, 62 Atl. 402 (1905), affirmed in 73 N. J. L. 683, 64 Atl. 1073 (1906); *People v. Knapp*, 147 App. Div. 436 (1911), 132 N. Y. S. 747, holding that "a trust company, like all corporations, is a creature of the statute, and the legislature has the right to prescribe what a corporation shall do and what it shall not do."

*Construction of statute*, Laws of 1913, p. 721, relating to trust companies, and providing in section six for forfeiture to the State bank fund of one hundred dollars for each day during which a violation of the act continues after ten days' notice by the superintendent of banks, is penal in its nature and must be strictly construed. *Pacific Title etc. Co. v. Sargent*, 73 Or. 485, 144 Pac. 452 (1914).

*Statute must be reasonable.* The laws of 1913, p. 721, regulating trust companies, providing in section one that the capital stock of each trust company shall be not less than one hundred thousand dollars, except that a company with not less than fifty thousand dollars may be incorporated in a city of not less than fifteen thousand population, and providing in section five that no person, firm or corporation which has not complied with the act shall use in the name under which its business is transacted the words "trust" or "trustee", is an unreasonable exercise of the police power and a violation of the contract of the state with a corporation which has used the word "trust" as a part of its name through a long course of years and which would be compelled to multiply its capital tenfold to comply with the law. *Pacific Title etc. Co. v. Sargent*, 73 Or. 485, 144 Pac. 452

of the condition and business methods of such corporations;<sup>2</sup> for reasonable classification of companies for that purpose;<sup>3</sup> for a deposit of security for the benefit or protection of creditors or investors;<sup>4</sup> and periodical statements or reports to a designated

(1914). See also *Alabama etc. Trans. Co. v. Doyle*, 210 Fed. 173 (1914), where the statute was held unconstitutional.

*Powers may be limited or reserved.* It is within the powers of the legislature, in enacting a general law for the creation, government and control of all trust companies, to impose, under given conditions, certain limitations upon the powers granted to or to reserve to existing trust companies brought under the act certain powers already possessed by them under existing laws, and to make it a misdemeanor for the officers of companies brought under the general act to do the things prohibited by the general statute, although the things made misdemeanors by the general law were not such under the act under which the trust company so brought under the general law was incorporated. *State v. Twining*, 73 N. J. L. 3, 62 Atl. 402 (1905), affirmed in 73 N. J. L. 683, 64 Atl. 1073 (1906).

<sup>2</sup> *State v. Northwestern Trust Co.*, 72 Neb. 497, 101 N. W. 14 (1904).

<sup>3</sup> *State v. Northwestern Trust Co.*, 72 Neb. 497, 101 N. W. 14 (1904).

<sup>4</sup> *Farmers' Loan etc. Co. v. Lake Street El. Co.*, 173 Ill. 439, 51 N. E. 55 (1898), affirming 68 Ill. App. 666, reversed on other grounds in 177 U. S. 51, 44 L. ed. 667, 20 Sup. Ct. 564; *State v. Stephens*, 136 Mo. 537, 37 S. W. 506 (1896); *State v. Tontine Surety Co.*, 62 Ohio St. 428, 57 N. E. 60 (1900); *State v. Mathews*, 62 Ohio St. 146, 56 N. E. 658 (1900).

*The imposition of active duties upon a trust company as trustee under a trust deed brings it within the prohibition of the Illinois statute, Act of 1887, as amended in 1889, regulating trust companies, making it unlawful for such a company to accept a trust before depositing with the auditor of public accounts for the benefit of the creditors, the sum of \$200,000 in stocks of the United States, or municipal bonds, of this State, etc. Farmers' Loan etc. Co. v. Lake Street El. Co., supra.*

*A foreign corporation cannot act as a trustee in Illinois, with active duties to perform without complying with the law requiring a deposit of security. Farmers' Loan etc. Co. v. Lake Street El. Co., supra.*

*Under the act of April 21, 1893, which requires bond investment companies to deposit with the state treasurer, in cash or securities approved by him, \$100,000 for the protection of investors within thirty days, or, on failure, forfeit their charter, where the treasurer received from such a company a note for \$100,000 secured by trust deed on land on which there was \$10,000 incumbrance and \$10,000 in cash he could agree with the company to apply the \$10,000 to the discharge of the incumbrance as soon as the holder would accept the money. State v. Stephens, supra.*

*A corporation which in consideration of stipulated instalments of money paid and to be paid, delivers to the payor a bond entitling him, upon conditions named, to receive an article of value, and requiring the payor to contribute to the payment of the expense of the corporation, is subject to the provisions of 93 Ohio Laws, p. 401, of April 25, 1898, which provides that every corporation and association other than a building and loan association doing business in that State in the way of placing or selling securities, bonds, debentures, or other investment securities of any kind on the partial payment or instalment plan, and every investment guaranty company doing business on the dividend service plan, shall, before doing*

officer of the state.<sup>5</sup> But the banking law of New York, (consolidated laws 1909, c. 8, § 27, subdivision 7), which prohibits loans to an officer, clerk or agent of a bank without the consent of the majority of the directors relates only to banks, and not to trust companies.<sup>6</sup>

§ 769. **Incorporation and Organization.**—The incorporation of trust companies is generally authorized by express provisions of statute,<sup>1</sup> and when there are such provisions, in addition to a general incorporation law, which declares that thereafter no corporation shall be organized to carry on a trust business in the state

business in Ohio, deposit with the treasurer \$25,000. *State v. Tontine Surety Co.*, *supra*.

*The Act of April 25, 1898*, (93 Ohio Laws 401), regulating certificate bond and investment companies, does not require that the sum of \$25,000 to be deposited with the treasurer of state by a company doing in this State the business of placing or selling securities, etc., shall be derived wholly from its capital stock. *State v. Mathews*, *supra*.

<sup>5</sup> *Farmers' Loan etc. Co. v. Lake Street El. Co.*, 173 Ill. 439, 51 N. E. 55 (1898), affirming 68 Ill. App. 666, reversed on other grounds in 177 U. S. 51, 44 L. ed. 667, 20 Sup. Ct. 564; *Anderson v. Commonwealth*, 117 S. W. 364 (Ky.) (1909); *In re McKinley Lanning L. & T. Co.*, 1 Pa. Dist. 551 (1892); *People v. Mutual Trust Co.*, 96 N. Y. 10 (1884).

A foreign corporation must comply with the Act of June 15, 1887 requiring corporate trustees to render statements to the state auditor. *Farmers' Loan etc. Co. v. Lake Street El. Co.*, *supra*.

*The Kentucky statute*, 1909 § 593 (Russell's St. § 2182), requiring officer of banks to make quarterly reports to the secretary of state, applies to institutions doing both a banking and a trust business. *Anderson v. Commonwealth*, *supra*.

<sup>6</sup> *People v. Knapp*, 147 Div. 437 (1911), 132 N. Y. S. 747.

<sup>1</sup> § 769. *Mulherin v. Kennedy*, 120 Ga. 1080, 47 S. E. 437 (1903); *State v. Barnes*, 108 Minn. 230, 122 N. W. 11 (1909); *State v. Nichols*, 40 Wash. 437, 82 Pac. 741 (1905); *In re Turley*, 9 Mackey (20 D. C.) 315 (1892).

*The provisions in the constitution of New York*, Art. 8, § 4, prohibiting the creation by special charter of corporations for banking purposes, does not apply to a trust company. *United States Trust Co. v. Brady*, 20 Barb. (N. Y.) 119.

*Use of the word "trust."* Under Laws 1903, p. 367, c. 176, providing for the incorporation of trust companies, and that no company hereafter organized under any other act shall use the word "trust" as part of its name, the change in the name of a pre-existing corporation so as to use the word "trust" as a part thereof is the creation of a new corporation, and is prohibited. *State v. Nichols*, 38 Wash. 309, 80 Pac. 462 (1905).

*Compliance with statute.* A provision in the articles of incorporation of a company that the nature of its business shall be a "general banking and trust business as provided by Ky. St. §§ 538-616, relating to banks and trust companies" is a sufficient compliance with a statute requiring a statement of the nature of the business of the company. *Brown v. Threlkeld*, 154 Ky. 833, 159 S. W. 595 (1913).



except under such act, a proposed corporation, whose powers, as defined by its articles are almost, if not wholly, confined to an agency or trust business, is not entitled to incorporation under the general law though its articles do not include all the items or powers named in the act under which trust companies are authorized.<sup>2</sup> Nor can a corporation which was in existence before the passage of an act be a trust company under its provisions.<sup>3</sup> But an act may apply to trust companies incorporated under previous laws, and which have complied with the provisions of the later act.<sup>4</sup>

§ 770. **Merger.** — Domestic corporations organized as trust companies may not merge, in the absence of statutory authority, and where the statute authorizes a merger, the effect is exclusively what is described by the act.<sup>1</sup> Since the legislature has a reserved right at all times to alter or repeal the charters of corporations, a statute authorizing the merger of trust companies, as applied to specially chartered trust companies existing at the time of its enactment, is a valid exercise of the reserve power of the state.<sup>2</sup> When one trust company merges into another without surrendering its corporate existence all its powers are transferred into the company into which it is merged, with the sole exception of the power of being sued and defending action against it at the time of merger.<sup>3</sup>

§ 771. **Liability of Stockholders.** — Statutes commonly provide that stockholders of loan and trust companies shall be individually liable for the debts of the corporation. They are generally either liable for the amount of the stock held by them,<sup>1</sup> or for double the amount of such stock.<sup>2</sup> In Maine the liability of the stockholders for "all contracts, debts, and engagements" of such companies cannot be limited to their banking features.<sup>3</sup>

<sup>2</sup> *State v. Nichols*, 38 Wash. 309, 80 Pac. 462 (1905).

<sup>3</sup> *Pacific Title etc. Co. v. Sargent*, 73 Or. 485, 144 Pac. 452 (1914).

<sup>4</sup> *In re Turley*, 9 Mackey (20 D. C.) 315 (1892).

<sup>1</sup> § 770. *In re Bregdorf's Will*, 206 N. Y. 309, 99 N. E. 714 (1912), affirming 149 App. Div. 529, 133 N. Y. S. 1012.

<sup>2</sup> *Colby v. Equitable Trust Co.*, 124 App. Div. 262 (1908), 108 N. Y. S. 978, affirmed in 192 N. Y. 535, 84 N. E. 1111.

<sup>3</sup> *In re Bergdorf's Will*, 206 N. Y. 309, 99 N. E. 714 (1912).

<sup>1</sup> § 771. *International Trust Co. v. Amercian Loan etc. Co.*, 62 Minn. 501, 65 N. W. 78 (1895); *Nichols v. Taunton Safe Deposit etc. Co.*, 203 Mass. 551, 89 N. E. 1035 (1909).

<sup>2</sup> *Murphy v. Wheatley*, 102 Md. 501, 63 Atl. 62 (1906); *Miners' etc. Bank v. Snyder*, 100 Md. 57, 59 Atl. 707, 108 Am. St. Rep. 390, 68 L. R. A. 312 (1904); *De Haven v. Pratt*, 223 Pa. St. 633, 72 Atl. 1068 (1909).

<sup>3</sup> *Maine Trust Co. v. Southern L. & T. Co.*, 92 Me. 433, 43 Atl. 24 (1899).

§ 772. **Officers and Agents. Powers and Duties. —**

*Directors*

The directors of a trust company have the general superintendence, and active management of all its concerns. They are bound generally to use every effort that a prudent business man would use in supervising his own affairs, with the right, however, ordinarily to rely upon the vigilance of the executive committee to ascertain and report any irregularity or improvident acts in its management, and each director sustains a distinct relation not only to the company itself, but also to its stockholders.<sup>1</sup>

A director of a trust company, even though he is the chief officer in charge of its bond department, has no authority by virtue of his position, to bind the company by a promise to pay the debt of a third party to a bank and to pledge the company's bonds to secure such payment.<sup>2</sup>

When an incorporated loan and trust company, engaged in the business of lending money upon real estate, and selling its securities, had, according to its custom, for the purpose of marketing the securities for cash indorsed upon them a written assignment and guaranty in blank, and had laid them aside awaiting purchasers, and afterwards the president of the company, in pursuance to the authority of the board of directors, applied some of them upon a debt due to himself, as trustee for others, but without inserting his name in the blank indorsement as assignee or covenantee, it was *held*, that the diversion of the securities from the original purpose was the act of the directors, and not of the president and that the taking of them by him under the authority given was the equivalent of a valid delivery to him and carried with it the contract of guaranty indorsed upon the securities.<sup>3</sup>

When one deals with the agent of a trust company one is bound to ascertain the nature and extent of the agent's authority.<sup>4</sup>

*President*

The president of a trust company has no authority to agree with the trust officer of a trust company who makes a note to the

<sup>1</sup> *Kavanaugh v. Gould*, 147 App. Div. 281 (1911), 131 N. Y. S. 1059.

<sup>2</sup> *Interstate Securities Co. v. Third National Bank*, 231 Pa. St. 422, 80 Atl. 888 (1911).

<sup>3</sup> *Crissley v. Interstate Loan etc. Co.*, 59 Kan. 561, 53 Pac. 867 (1898).

<sup>4</sup> *Interstate Securities Co. v. Third National Bank*, 231 Pa. St. 422,

trust company as an accommodation to the president, that he will not be called upon to pay it.<sup>5</sup>

### *Vice-President*

The Vice-President of a trust company, by virtue of his office, has no authority to sign an instrument under seal in the name of the company guaranteeing the sale of certain bonds and stocks before a certain date at not less than a certain sum.<sup>6</sup>

### *Manager of Branch*

The powers of one having the title of manager of the branch of a trust company, engaged in banking and held out to the world as such, who has a cashier under him, and apparently slight control exercised over him, are not to be presumed to be limited to the powers of an ordinary cashier.<sup>7</sup>

### *Executive Committee*

Where the by-laws of a trust company impose upon its executive committee the duty to require all loans and investments to be reported to it at its next meeting for approval, the committee must require the loans to be presented and must examine them, and its failure to do so is not excused by the facts that the loans were not presented to it.<sup>8</sup>

## § 773. Representation of Officers and Agents.—

### *In General*

The doctrine of respondeat superior applies to a trust company acting as trustee and even though the directors of the company are not guilty of any personal fraud or bad faith, yet the trust company would be liable for any fraud or bad faith on the part of its agents to whom the directors had intrusted the business.<sup>1</sup>

80 Atl. 888 (1911); *Gause v. Commonwealth Trust Co.*, 124 App. Div. 438 (1907), 108 N. Y. S. 1080, affirming 55 Misc. 110, 106 N. Y. S. 288.

<sup>5</sup> *Chestnut Street Trust etc. Co. v. Hart*, 217 Pa. St. 506, 66 Atl. 870 (1905).

<sup>6</sup> *Gause v. Commonwealth Trust Co.*, 124 App. Div. 438 (1907), 108 N. Y. S. 1080.

<sup>7</sup> *Union Savings etc. Co. v. Krumm*, 88 Wash. 20, 152 Pac. 681 (1915).

<sup>8</sup> *Kavanaugh v. Commonwealth Trust Co.*, 64 Misc. 303, 118 N. Y. S. 758 (1909).

<sup>1</sup> § 773. *Minneapolis Trust Co. v. Menage*, 73 Minn. 441, 76 N. W. 195 (1898).

But when one deals with the agent of a trust company one is bound to ascertain the nature and extent of the agent's authority.<sup>2</sup>

### *President*

The President of the trust company has no authority to certify bonds left in the possession of the company as trustee, and use them as collateral to cover his own defalcations.<sup>3</sup> The company is responsible for his fraudulent act committed in connection with his official duties,<sup>4</sup> and his knowledge in respect thereto is imputable to it.

### *Treasurer*

The Treasurer of a trust company has no authority to use as security for his antecedent debt to the company bonds which are given to him by the husband of their owner, when he knows to whom they belong. But when the company which had received the bonds, sold them and held the proceeds, it is estopped from setting up want of authority of its treasurer to bind it by a certificate issued by him to such owner therefor.<sup>5</sup>

### *Director and Manager of Bond Department*

A director of a trust company who is manager of its bond department has no authority by virtue of either position to bind the company by a promise to pay the debt of a third party to a bank and a pledge of the trust company's bonds to secure such payment.<sup>6</sup>

### *Secretary*

The fact that an investor, after having become acquainted with the secretary of an investment company, who was also a lawyer, through her dealings with the company, consulted him with reference to certain independent legal matters, did not affect

<sup>2</sup> *Interstate Securities Co. v. Third National Bank*, 231 Pa. St. 422, 80 Atl. 888 (1911); *Gause v. Commonwealth Trust Co.*, 124 App. Div. 438 (1907), 108 N. Y. S. 1080, affirming 55 Misc. 110, 106 N. Y. S. 288.

<sup>3</sup> *Washington etc. Ry. Co. v. Real Estate Trust Co.*, 177 Fed. 306 (1910).

<sup>4</sup> *Germania Safety Vault etc. Co. v. Driskell*, 23 Ky. 66 S. W. 610, Law 2050 (1902); *Tate v. Security Trust Co.*, 63 N. J. Eq. 559, 52 Atl. 313 (1902).

<sup>5</sup> *Callender v. Kelly*, 190 Pa. St. 455, 42 Atl. 957 (1899).

<sup>6</sup> *Interstate Securities Co. v. Third National Bank*, 231 Pa. St. 422, 80 Atl. 888 (1911).

the liability of the company to her for funds invested by her with it through the secretary, and embezzled by him.<sup>7</sup>

### *Paying Teller*

Where a paying teller of a trust company, exercising the functions of a banking company, certifies a check of a depositor, evidence that such teller was in the habit of making such certifications for the benefit of payee of checks, and that all checks so certified were paid and taken up by the trust company, is sufficient to establish the agency of such teller in certifying such checks.<sup>8</sup>

### *Actuary*

When the actuary of a trust company is held out to the public as competent to give its note for money borrowed to be used in payment of pressing liabilities, and he acted in such transaction in conformity to established usage of the company, it cannot deny that he had the powers which he exercised, and it is bound by his act.<sup>9</sup>

## § 774. Knowledge of Officers and Agents.

### *When not Imputable to the Company*

When the vice-president of a trust company, who was the president of a railroad company, promised to have discounted at the trust company a note which he had induced to be borrowed by one to whom the railroad was indebted, and the transaction was neither carried on at his office nor submitted to the other officials, the transaction is either for the benefit of the railroad or himself and the company is not chargeable with his knowledge.<sup>1</sup> A trust

<sup>7</sup> *Ring v. Long Island Real Estate etc. Co.*, 93 App. Div. 442 (1904), 87 N. Y. S. 682, affirmed in 184 N. Y. 553, 76 N. E. 1107.

<sup>8</sup> *Muth v. St. Louis Trust Co.*, 88 Mo. App. 596 (1901).

<sup>9</sup> *Creswell v. Lanahan*, 101 U. S. 347, 25 L. ed. 853 (1880).

<sup>1</sup> § 744. *Jacobus v. Jamestown Mantel Co.*, 211 N. Y. 54, 105 N. E. 210 (1914), affirming 149 App. Div. 356, 134 N. Y. S. 418. In this case the president and cashier of a trust company embarked in a partnership undertaking with an executor who executed a mortgage to the trust company on property of the estate, the proceeds being used in the partnership venture, and not for the benefit of the estate and it was held, that the knowledge of the president and cashier of the trust company of the fraudulent misapplication of the sum realized by the mortgage was not imputable to the trust company, and the mortgage was enforceable in its hand.

company with which a loan was negotiated by the president of a corporation in behalf of its stockholders, is not chargeable with knowledge of an agreement between the stockholder simply because the president of the corporation was a director of the trust company.<sup>2</sup> Where the agent of the trust company in the course of his principal's business, commits an independent fraud for his own benefit, designedly against his principal, and it is essential to the carrying out of the fraud that the real facts should be concealed from his principal the presumption that the principal is notified is destroyed, and the inference is that no communication was made.<sup>3</sup> The knowledge of fraud of the president of a trust company in depositing bonds of another as collateral security under fictitious loans for his own benefit is not imputable to the company;<sup>4</sup> nor when the president of a trust company, acting as attorney for others, negotiated to his clients the execution of a mortgage which was subsequently assigned to the company, is the company chargeable with any knowledge its president may have had in regard to the purpose for which the mortgage was given.<sup>5</sup> Also, the knowledge of an officer of a trust company of an assignment of a deposit will not be imputed to the company upon the officer's connection with it did it not relate to the receiving or crediting deposits.<sup>6</sup>

### *When Imputable to the Company*

When the president of a trust company which deposited the funds of the estate of which it was administrator in an insolvent bank was also president of the bank, his knowledge of the condition of the bank was the knowledge of the trust company in a contest between it and the distributees of the estate, even though the rule might be considered otherwise in a controversy between the two corporations,<sup>7</sup> and when the vice-president of a trust company is an active member of its investment committee and has had

<sup>2</sup> *Haskell v. Columbus Savings etc. Co.*, 207 Fed. 322 (1913).

<sup>3</sup> *Camden Safe Deposit etc. Co. v. Lord*, 67 N. J. Eq. 489, 58 Atl. 607 (1904).

<sup>4</sup> *Real Estate Trust Co. v. Washington, etc. R. Co.*, 191 Fed. 566 (1910), modifying 177 Fed. 306, and *certiorari* denied in 223 U. S. 724, 56 L. ed. 631, 32 Sup. Ct. 525.

<sup>5</sup> *Tate v. Security Trust Co.*, 63 N. J. Eq. 559, 52 Atl. 313 (1902).

<sup>6</sup> *Sturdee v. Cuba Eastern R. Co.*, 196 Fed. 211 (1912).

<sup>7</sup> *Germania Safety Vault etc. Co. v. Driskell*, 66 S. W. 610, 23 Ky. Law 2050 (1902).

delegated to him personal management of certain matters for it, the notice which comes to him in respect to such matters, is notice to the company.<sup>8</sup> And when a cashier of a trust and savings company in negotiating a loan and collecting the proceeds thereof acquires knowledge of a pledge of shares of its capital stock by a stockholder, such knowledge is imputable to the company.<sup>9</sup>

§ 775. **Liabilities.**

*Managing Agents*

When the managing agents of a trust company mingle moneys collected for another with the current funds of the company for use in its business, in violation of the express direction of the owner to remit, or knowingly permit their subordinates to do so, and the fund is thereby lost, such agents will be personally liable to the owner therefor, although, at the time of such misappropriation, it was the intent of such managing agents to account for and return the money to the owner upon demand.<sup>1</sup>

And when an officer of a trust company makes a note to a large amount, payable to the company as an accommodation for its president on the assurance that he will never be asked to pay it, he is liable thereon unless the trust company agrees that he shall not be held on it.<sup>2</sup>

*Director*

The directors of a trust company are liable for losses resulting from their negligence,<sup>3</sup> and if they take their vacations without making reasonable provision for the meetings of the board or of the executive committee, they assume the risk of misconduct or mismanagement of the officers, occasioning loss, if, in the discharge of their duties they could have prevented or lessened the loss, and they cannot escape liability therefor by pleading they were on their vacations, in accordance with the custom, at the time of year,

<sup>8</sup> *Jacobus v. Jamestown Mantel Co.*, 149 App. Div. 356 (1912), 134 N. Y. S. 418, affirmed in 211 N. Y. 154, 105 N. E. 210 (1914).

<sup>9</sup> *Birmingham Trust & Savings Co. v. Louisiana National Bank*, 99 Ala. 379, 13 So. 112 (1893).

<sup>1</sup> § 775. *Sweet v. Montpelier Savings etc. Co.*, 73 Kan. 47, 84 Pac. 542 (1906).

<sup>2</sup> *Chestnut Street etc. Co. v. Hart*, 217 Pa. St. 506, 66 Atl. 870 (1905).

<sup>3</sup> *Kavanaugh v. Commonwealth Trust Co.*, 64 Misc. 303, 118 N. Y. S. 758 (1909); *Kavanaugh v. Gould*, 147 App. Div. 281 (1911), 131 N. Y. S. 1059. See *Chambers v. Land Credit Trust Co.*, 92 Kan. 30, 139 Pac. 1178 (1914), where the evidence was not sufficient to show negligence.

of directors of trust companies.<sup>4</sup> While the directors of a trust company may delegate to others their work, they cannot delegate their responsibility, and they are therefore liable for losses occasioned to the company by failure of the executive committee, to whom they had committed their duties, to examine loans and collateral.<sup>5</sup>

When the law requires the board of directors of every trust company to examine into its books, papers and affairs, so as to ascertain the value and security of its loan, and to inform themselves as to the condition of the company, they cannot be heard to say that they did not know what a fair and intelligent discharge of their duties must have disclosed.<sup>6</sup>

### *Executive Committee*

The members of an executive committee of a trust company are bound to be on their guard to detect any irregularities or improvident acts on the part of the executive officers, and to scan critically the detailed reports which are made to them by such officers, and hence their diligence is greater and the rule of their liability more strict than that of a director who is not a member of that committee.<sup>7</sup>

§ 776. **Criminal Liability.** — The exhibiting of a false minute of an alleged meeting of the board of directors of a trust company to an examiner appointed by the banking department, with the intent to deceive such examiner as to the financial condition of the company is exhibiting of a false paper under the statute of New Jersey, and is a misdemeanor.<sup>1</sup> And where one of two officers of a trust company produces a false minute to the examiner, in the presence of the other who by his silence acquiesces in such exhibition although he knows of its falsity, both are guilty of exhibiting under the statute of New Jersey.<sup>1</sup> But in New York a director of a trust company who neglects a public duty has

<sup>4</sup> *Kavanaugh v. Commonwealth Trust Co.*, 64 Misc. 303, 118 N. Y. S. 758 (1909).

<sup>5</sup> *Kavanaugh v. Gould*, 147 App. Div. 281 (1911), 131 N. Y. S. 1059; *Kavanaugh v. Commonwealth Trust Co.*, 64 Misc. 303, 118 N. Y. S. 758 (1909).

<sup>6</sup> *Gregory v. Binghampton Trust Co.*, 168 App. Div. 805 (1915), 154 N. Y. S. 376.

<sup>7</sup> *Kavanaugh v. Gould*, 147 App. Div. 281 (1911), 131 N. Y. S. 1059.

<sup>1</sup> § 776. *State v. Twining*, 73 N. J. L. 3, 62 Atl. 402 (1905).



committed no crime since he is no "public officer" within the meaning of the statute of that state.<sup>2</sup>

### *Intent*

Upon the trial of an officer of a trust company charged with appropriating the company's funds to his own use by becoming indebted to it, a guilty intent may be inferred from the mere fact of the indebtedness.<sup>3</sup>

### *Indictments*

For the form and sufficiency of indictments see the cases cited in the note.<sup>4</sup>

§ 777. **Powers.** — The powers of trust companies are determined largely by the statutes of the states which incorporate them.<sup>1</sup> They are, however, generally authorized to exercise many functions of banking corporations and so have been held entitled to receive deposits,<sup>2</sup> make loans,<sup>3</sup> discount commercial paper,<sup>4</sup> buy and sell

<sup>2</sup> *People v. Knapp*, 206 N. Y. 373, 99 N. E. 841, 1914B Ann. Cas. 243, affirming 147 App. Div. 436, 132 N. Y. S. 747.

<sup>3</sup> *State v. Barnes*, 108 Minn. 227, 122 N. W. 4 (1909). See *People v. Knapp*, 147 App. Div. 436 (1911), 132 N. Y. S. 747.

<sup>4</sup> *State v. Barnes*, 108 Minn. 527, 122 N. W. 12 (1909); *State v. Barnes*, 108 Minn. 230, 122 N. W. 11 (1909), indictment sufficient; *People v. Knapp*, 147 App. Div. 436 (1911), 132 N. Y. S. 747, indictment, not bad, as indefinite and uncertain; *People v. Knapp*, 206 N. Y. 373, 99 N. E. 841, 1914B Ann. Cas. 243, affirming 147 App. Div. 436, 132 N. Y. S. 747; *Commonwealth v. Loving*, 29 Ky. Law 175, 92 S. W. 575 (1906), indictment defective in failing to allege what office the accused held or whether he was an ordinary agent of the company.

<sup>1</sup> § 777. See *Kavanaugh v. Commonwealth Trust Co.*, 64 Misc. 303, 118 N. Y. S. 758 (1909); *Jenkins v. Neff*, 186 U. S. 203, 46 L. ed. 1140, 22 Sup. Ct. 905 (1902), affirming 163 N. Y. 320, 57 N. E. 408; *First National Bank v. Guardian Trust Co.*, 187 Mo. 494, 86 S. W. 109, 70 L. R. A. 79 (1905), power to execute a note; *State v. Lincoln Trust Co.*, 144 Mo. 562, 46 S. W. 593 (1898), trusts for married women; *State v. Interstate Sav. Inv. Co.*, 64 Ohio St. 283, 60 N. E. 220 (1901).

<sup>2</sup> *Venner v. Farmers' L. & T. Co.*, 54 App. Div. 271 (1900), 66 N. Y. S. 773, affirmed in 176 N. Y. 549, 68 N. E. 1125; *Tucker v. New Hampshire Trust Co.*, 69 N. H. 187, 44 Atl. 927 (1897), deposit of trust funds in savings department; *People v. California Safe Deposit etc. Co.*, 168 Cal. 241, 141 Pac. 1181, 1915A L. R. A. 299; *Old Colony Trust Co. v. Commonwealth*, 220 Mass. 409, 107 N. E. 950 (1915), holding that the savings department is prohibited from segregating deposits beyond a certain amount; *Steiner v. Mutual Alliance Trust Co.*, 139 App. Div. 645 (1910), 124 N. Y. S. 184; *Lippett v. Thames L. & T. Co.*, 88 Conn. 185, 90 Atl. 369 (1914); *Title Ins. etc. Co. v. Williamson*, 18 Cal. App. 324, 123 Pac. 245 (1912), deposit for a specific purpose. But see *State v.*

promissory notes<sup>5</sup> or bills of exchange,<sup>6</sup> issue certificate of deposit,<sup>7</sup> and take over the business of a debtor to save a debt.<sup>8</sup> They have also been authorized to act as a receiver<sup>9</sup> and as a fiscal agent;<sup>10</sup> and they may make investments for others,<sup>11</sup> sell bonds of another company<sup>12</sup> or act as trustee.<sup>13</sup>

But a trust company generally has no power to deal in stock, either of itself<sup>14</sup> or of another bank,<sup>15</sup> to lend its credit,<sup>16</sup> or to act as promoter of a corporation.<sup>17</sup>

Lincoln Trust Co. 144 Mo. 562, 46 S. W. 593 (1898); *Stone v. St. Louis Union Trust Co.*, 183 Mo. 261, 166 S. W. 1091 (1914).

<sup>3</sup> *Midland Sav. etc. Co. v. Foss Impr. Co.*, 34 Okla. 564, 126 Pac. 720 (1912); *State v. Barnes*, 108 Minn. 230, 122 N. W. 11 (1909); *State v. Barnes*, 108 Minn. 527, 122 N. W. 12 (1909); *Empire Trust Co. v. Coleman*, 85 Misc. 312, 147 N. Y. S. 740 (1914).

<sup>4</sup> *Binghampton Trust Co. v. Auten*, 68 Ark. 294, 57 S. W. 936 (1900). But see *Pratt v. Short*, 79 N. Y. 437, 35 Am. Rep. 531; *New York State L. & T. Co. v. Helmer*, 77 N. Y. 64; *United State Trust Co. v. Brady*, 20 Barb. (N. Y.) 119; *Jenkins v. Neff*, 186 U. S. 230, 46 L. ed. 1140, 22 Sup. Ct. 905 (1902), affirming 163 N. Y. 320, 57 N. E. 408; *McCausland v. Roseville Trust Co.*, 94 Atl. 591 N. J. Eq. (1915).

<sup>5</sup> *Binghampton Trust Co. v. Clark*, 32 App. Div. 151, 52 N. Y. Sup. 941.

<sup>6</sup> *State v. Lincoln Trust Co.*, 144 Mo. 562, 46 S. W. 593 (1898).

<sup>7</sup> *Saginaw Bank v. Western Pennsylvanian Title etc. Co.*, 105 Fed. 491 (1900).

<sup>8</sup> *Union Savings etc. Co. v. Krumm*, 88 Wash. 20, 152 Pac. 681 (1915).

<sup>9</sup> *Goff v. Goff*, 54 W. Va. 364, 46 S. E. 177 (1903).

<sup>10</sup> *Kavanaugh v. Gould*, 148 App. Div. 281 (1911), 131 N. Y. S. 1059.

<sup>11</sup> *Ring v. Long Island Real Estate Co.*, 93 App. Div. 442 (1904), 87 N. Y. S. 682, affirmed in 184 N. Y. 553, 76 N. E. 1107.

<sup>12</sup> *People's National Bank v. Central Trust Co.*, 179 Mo. 648, 78 S. W. 618 (1903); *Bauernschmidt v. Maryland Trust Co.*, 89 Md. 507, 43 Atl. 790 (1899).

<sup>13</sup> *Spalding Co. v. Roberts*, 70 Cal. 175, 149 Pac. 41 (1915); *People v. California Safe Deposit etc. Co.*, 22 Cal. App. 69, 133 Pac. 324 (1913); *Davidge v. Guardian Trust Co.*, 203 N. Y. 331, 96 N. E. 751 (1911), reversing 136 App. Div. 78, 120 N. Y. S. 628, if the company has no duties as trustee under a mortgage it is not authorized to make representations as to the character of the bonds secured by the mortgage.

If a foreign trust company act as trustee it must comply with the laws of the state in which it acts. *Farmers' L. & T. Co. v. Lake St. El. R. Co.*, 173 Ill. 439, 51 N. E. 55 (1898); *Pennsylvania L. Ins. Co. v. Banerle*, 143 Ill. 459, 33 N. E. 166.

As to the right of commission when acting as trustee, see *Davis Trust Co. v. Smith*, 226 Fed. 410 (1915).

<sup>14</sup> *Maryland Trust Co. v. National Mechanics' Bank*, 102 Md. 608, 63 Atl. 70 (1906).

<sup>15</sup> *State v. Bankers' Trust Co.*, 157 Mo. App. 557, 138 S. W. 669 (1911). But see *Madison Trust Co. v. Carnegie Trust Co.*, 167 App. Div. 4, 125 N. Y. S. 517 (1915), affirmed in 215 N. Y. 475, 109 N. E. 580; *Continental Trust Co. v. Brown*, 179 S. W. 939, (Tex. Civ. App.) (1915).

<sup>16</sup> *Ward v. Joslin*, 186 U. S. 142, 46 L. ed. 1093, 22 Sup. Ct. 807 (1902),

§ 778. **Dissolution.** — In Maine it is held that the Laws 1905, Chapter 85, as amended by Laws 1907, Chapter 137, authorizing the winding up of the affairs of “any corporation” when insolvent or in danger thereof, or on mismanagement of its affairs, etc., do not apply to trust companies, over which the bank examiner is vested with sole authority.<sup>1</sup>

affirming 105 Fed. 224, guaranteeing debt of another; *Richeson v. Mona National Bank*, 96 Ark. 594, 132 S. W. 913 (1910), surety; But see *McCauley v. Rigewood Trust Co.*, 81 N. J. L. 86, 79 Atl. 327 (1911).

<sup>17</sup> *Richard Hanlon Millinery Co. v. Mississippi Valley Trust Co.*, 251 Mo. 553, 158 S. W. 359 (1913).

<sup>1</sup> § 778. *Craughwell v. Mousam River Trust Co.*, 113 Me. 53, 95 Atl. 221 (1915).



## PART II

### THE NATIONAL BANKING LAWS<sup>a</sup> AND THEIR CONSTRUCTION

#### U. S. REVISED STATUTES, 1878, AND SUBSEQUENT ACTS. WITH NOTES UPON THE CASES

[As many cases refer to the sections of the law of 1864, and many others to those of the Revised Statutes, it has been thought best so to arrange the law that either manner of reference will easily lead to the appropriate text. Accordingly, the sections from 1 to 63 inclusive follow the numbering in the act of June 3, 1864, the numbers in parentheses representing the corresponding sections of the Revised Statutes in the edition of 1878. This necessitates changing the order of the Revised Statutes, but the following Synopsis will make it easy to refer to the section of this book which corresponds to a given section of the Revised Statutes.]

#### SYNOPSIS OF THE NATIONAL BANKING LAWS

##### COMPTROLLER OF THE CURRENCY

R. S.	(324.)	Bureau of.	§ 1.
"	(325.)	Appointment.	§ 1.
"	(326.)	Bond and oath.	§ 1.
"	(327.)	Deputy.	§ 1.
"	(328.)	Clerks.	§ 1.
"	(329.)	His interest in national banks.	§ 1.
"	(330.)	His seal.	§ 2.
"	(331.)	Rooms, vaults, etc.	§ 3.
"	(332.)	Banks in District of Columbia.	§ 3.
"	(333.)	His report.	§ 3. See R. S. 3811.
"	(380.)	Conduct of suits.	§ 56.
"	(563.)	Jurisdiction of District Courts.	§ 57. See §§ 70, 82.
"	(629.)	Jurisdiction of Circuit Courts.	§ 57.
"	(640.)	Removal from State courts.	§ 57.
"	(736.)	Proceedings to enjoin Comptroller.	§ 57.
"	(884.)	Comptroller's papers. Evidence.	§ 2.
"	(3811.)	Comptroller's report.	§ 3.
"	(3413.)	Tax on municipal notes.	§ 41.
"	(3416.)	Change of State banks into national.	(Returns.)
"	(3417.)	Exemption of national banks. Taxes.	§ 41.

<sup>a</sup>See Federal Reserve Act, *infra*, §§ 85-199.

## THE NATIONAL BANKING LAWS AND THEIR CONSTRUCTION

### ORGANIZATION AND POWERS

- R. S. (5133.) Formation. § 5.
- " (5134.) Certificate. § 6. See §§ 7, 12-15, 81.
- " (5135.) Acknowledgment of. § 6.
- " (5136.) Powers. § 8.
- " (5137.) Real estate. § 28.
- " (5138.) Capital, amount of. § 7. See §§ 12-15, 81.
- " (5139.) Shares and transfer. § 12.
- " (5140.) Payment of. § 14.
- " (5141.) Delinquent shareholder. § 15.
- " (5142.) Increase of. § 13. See § 81.
- " (5143.) Reduction of. § 13.
- " (5144.) Shareholders' vote. § 11.
- " (5145.) Directors, election of. §§ 9, 10.
- " (5146.) Qualifications. §§ 9, 10.
- " (5147.) Oath. §§ 9, 10.
- " (5148.) Vacancies. §§ 9, 10.
- " (5149.) Failure to elect. §§ 9, 10.
- " (5150.) President, election of. §§ 9, 10.
- " (5151.) Liability of shareholders. § 12.
- " (5152.) Executors and trustees not personally liable. § 63.
- " (5153.) Depositories of public moneys. § 45.
- " (5154.) Change of State banks to national. § 44.
- " (5155.) When the State banks have branches. § 44. See § 65.
- " (5156.) Rights of banks organized under Act of 1863 reserved. § 62.

### OBTAINING AND ISSUING CIRCULATING NOTES

- R. S. (5157.) What associations governed by Chapters II., III., IV. § 62.
- " (5158.) United States bonds defined. § 4.
- " (5159.) Deposit of bonds before issue of circulating notes. § 16.
- " (5160.) Increase or reduction of such deposit. § 16.
- " (5161.) Exchange of coupon for registered bonds. § 16.
- " (5162.) Transfer of bonds. § 19.
- " (5163.) Registry of transfer. § 19.
- " (5164.) Notice of transfer. § 19.
- " (5165.) Examination of registry and bonds. § 20.
- " (5166.) Examination of bonds by banks annually. § 25.
- " (5167.) Custody of bonds, interest on. § 26.
- " (5168.) Comptroller to determine if bank can commence business. § 17.
- " (5169.) Certificate of authority to commence business. § 12.
- " (5170.) Publication of this certificate. § 12.
- " (5171.) Circulating notes, delivery of. § 21. (Repealed. See § 76.)
- " (5172.) Printing, denomination, form. § 22.
- " (5173.) Plates and dies. § 41.
- " (5174.) Examination of. § 41.
- " (5175.) Limit to issue of notes under five dollars. § 22.
- " (5176.) Limit to circulation of certain banks. § 22. (Repealed. See § 76.)
- " (5177.) Limit to aggregate circulation. § 22.
- " (5178.) Apportionment of circulating notes. § 22.

## THE NATIONAL BANKING LAWS AND THEIR CONSTRUCTION

- R. S. (5179.) Equalizing the apportionment. § 22.  
 " (5180.) How the notes are to be withdrawn. § 22.  
 " (5181.) Removal of bank to another State. § 22.  
 " (5182.) Notes to be received for certain demands. § 23.  
 " (5183.) Issue of other notes prohibited. § 23.  
 " (5184.) Mutilated and worn notes. § 24.  
 " (5185.) Gold-note associations organized. § 24. See § 65.  
 " (5186.) Their reserve and duty to receive notes. § 24. See § 78.  
 " (5187.) Penalty for issuing notes to unauthorized banks. § 27.  
 " (5188.) Penalty for imitating notes. § 27.  
 " (5189.) Penalty for defacing notes. § 28.

### REGULATION OF THE BANKING BUSINESS

- R. S. (5190.) Place of business. § 8.  
 " (5191.) Reserve. 31. See §§ 78, 83.  
 " (5192.) What may be counted toward the reserve. § 31.  
 " (5193.) Certain certificates may be. § 31.  
 " (5194.) Limit on power to issue such certificates. § 31.  
 " (5195.) Place for redemption. § 32. See § 83.  
 " (5196.) Banks to receive notes of other banks. § 32.  
 " (5197.) Rate of interest. § 30.  
 " (5198.) Usury, consequences. § 30.  
 " (5199.) Dividends. § 33.  
 " (5200.) Limit of liabilities of one firm or person. § 29.  
 " (5201.) Loan on stock, or purchase of, prohibited. § 35.  
 " (5202.) Limit of bank's indebtedness. § 36.  
 " (5203.) Restriction on use of circulating notes. § 37.  
 " (5204.) Capital, withdrawal of, prohibited. § 38.  
 " (5205.) Capital, enforcing payment of deficiency. § 38.  
 " (5206.) Restriction on use of notes of other banks. § 39.  
 " (5207.) United States notes not to be used as collateral. § 39.  
     See § 78.  
 " (5208.) Penalty for falsely certifying checks. § 55. See § 79.  
 " (5209.) Penalty for embezzlement. § 55.  
 " (5210.) Shareholders, list of. § 40.  
 " (5211.) Reports to Comptroller. § 34. See § 66.  
 " (5212.) As to dividends. § 34.  
 " (5213.) Penalty for failure to report. § 34.  
 " (5214.) Tax duties to United States. § 41. See §§ 77, 80.  
 " (5215.) Report, or tax return, half-yearly. § 41.  
 " (5216.) Penalty for failure to return. § 41.  
 " (5217.) Penalty for failure to pay duties. § 41.  
 " (5218.) Refunding excessive duties. § 41.  
 " (5219.) State taxation. § 41.

### DISSOLUTION AND RECEIVERSHIP

- R. S. (5220.) Voluntary dissolution. §§ 42, 43.  
 " (5221.) Notice of intent to dissolve. §§ 42, 43.  
 " (5222.) Deposit to redeem circulation. §§ 42, 43.  
 " (5223.) Exemption of bank consolidating with another. §§ 42, 43.  
 " (5224.) Reassignment of bonds. §§ 42, 43.  
 " (5225.) Destruction of redeemed notes. §§ 42, 43.  
 " (5226.) Mode of protesting notes. § 46.

## THE NATIONAL BANKING LAWS AND THEIR CONSTRUCTION

- R. S. (5227.) Examination by special agent. § 47.  
 “ (5228.) Continuing business after default. § 46.  
 “ (5229.) Notice to holders, redemption, cancellation of bonds.  
     § 47.  
 “ (5230.) Sale of bonds, auction. § 48.  
 “ (5231.) Sale of bonds, private sale. § 49.  
 “ (5232.) Disposal of protested notes. § 47.  
 “ (5233.) Cancellation of notes. § 47.  
 “ (5234.) Receiver, Appointment of. § 50.  
 “ (5235.) Notice to present claims. § 50.  
 “ (5236.) Dividends. § 50.  
 “ (5237.) Injunction on receiver. § 50.  
 “ (5238.) Fees and expenses. § 51.  
 “ (5239.) Penalty for violating National Banking Law. § 53.  
 “ (5240.) Examiners, appointment of occasional. § 54.  
 “ (5241.) Limit of visitatorial powers. § 54.  
 “ (5242.) Transfers, when void, preference. § 52.  
 “ (5243.) “National”, use of the title. § 54.  
 “ (5415.) Counterfeiting national bank notes. § 59.

## SUBSEQUENT LAWS

1878. May 31. United States legal tender notes, retirement of, forbidden. § 64.  
 1880. Feb. 14. Gold banks may become currency banks. § 65.  
 1881. Feb. 26. Verification of bank returns by oath before a notary. § 66.  
 1882. July 12. Extension of existence of national banks. § 67.  
     Two-thirds vote of stockholders. § 68.  
     Examination by Comptroller. § 69.  
     Identity, rights, and liabilities preserved. § 70.  
     Dissenting shareholders. § 71.  
     Redemption of circulation. § 72.  
     Closing banks not so extending their term. § 73.  
     Bonds not to exceed one-fourth of the capital, and circulation not to exceed ninety per cent of bonds.  
     Assessments for redemption of notes. § 74.  
     Increase or withdrawal of circulation. § 75.  
     Deposit of bonds and notes issued not to exceed ninety per cent of paid capital. § 76.  
     Exchange of three and one half per cent bonds for three per cent registered. § 77.  
     Gold certificates issued in exchange for coin until, etc. Gold or silver certificates counted in reserve. No bank to be member of a clearing-house that will not take gold and silver certificates in payment of balances. § 78.  
     Penalty for false certification of check. § 79.  
 1883. March 3. Taxes on bank capital, deposits, checks, drafts, orders, and vouchers repealed. § 80.  
 1886. May 1. Increase of capital, change of name, or location. § 81.  
 1887. March 3. Jurisdiction. § 82.  
     Cities of 50,000 inhabitants may be added to “reserve cities.” § 83.



- Cities of 200,000 inhabitants may be "central reserve cities." § 83.
1888. Aug. 13. Legal tender notes redeemed at San Francisco. § 83.
1888. Aug. 13. National banks deemed citizens of the United States. § 83 A.
1890. July 14. Deposits of national banks, for redemption of circulation notes, except the five per centum to be recovered into the treasury. § 83 B.
1892. July 28. Redemption of notes without signature or with forged signature. § 83 C.
1892. Aug. 3. Decision as to whether receiver or agent shall wind up business. § 83 D.
- Duties of receivers so retained. § 83 D.
- Agent, if elected, to be bonded. § 83 D.
- Agent's powers and duties. § 83 D.
- Powers of administrators, executors, trustees, etc., if shareholders. § 83 D.
- Proceeds of assets, how distributed. § 83 D.
1897. March 2. Substitute for Act of 1892, August 3, *supra*. The only change consists in providing for the selection of a successor to the agent, in case he shall refuse to serve, dies, resigns, or is removed. § 83 E.
1900. March 14. Requisite capital for national banks. § 83 F.
1901. March 3. National banks depositories of public moneys, except custom receipts. § 83 G.
- The exception is not applicable to Hawaii, Alaska, etc. § 83 G.
1902. April 12. National Banks. Charters may be extended twenty years. § 83 H.
- Full text of the Acts of June 20, 1874; Jan. 14 and 19, and Feb. 8, 18, and 19, of 1875; and June 30, 1876. § 84.
1908. May 30. Amendment of national banking laws. § 84 A.
1913. Dec. 23. Federal Reserve Act. §§ 85-199.
1914. August 4, 15. 1915. March 3. 1916. May 15. September 7. Amendments to Federal Reserve Act. §§ 199 A, 199 B, 199 C, 199 D, 199 E.

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The sections of this book from 1 to 63 are correspondent to those of the National Banking Act, June 3, 1864.

The figures in parentheses refer to the sections of the United States Revised Statutes.

The cases upon any given section may sometimes be found in that section, but *generally* may be found in the section whose number is 200 plus the number of that section.

#### COMPTROLLER OF THE CURRENCY<sup>1</sup>

§ 1. (a) (324.) **Bureau of Comptroller established.** — There shall be in the Department of the Treasury a Bureau charged

<sup>1</sup> § 1. See § 201.

with the execution of all laws passed by Congress relating to the issue and regulation of a national currency secured by United States bonds; the chief officer of which Bureau shall be called the Comptroller of the Currency, and shall perform his duties under the general direction of the Secretary of the Treasury.<sup>2</sup>

(b) (325.) **Appointment and Term.** — The Comptroller of the Currency shall be appointed by the President, on the recommendation of the Secretary of the Treasury, by and with the advice and consent of the Senate, and shall hold his office for the term of five years, unless sooner removed by the President upon reasons to be communicated by him to the Senate; and he shall be entitled to a salary of five thousand dollars a year.

(c) (326.) **Oath and Bond.** — The Comptroller of the Currency shall, within fifteen days from the time of notice of his appointment, take and subscribe the oath of office; and he shall give to the United States a bond in the penalty of one hundred thousand dollars, with not less than two responsible sureties, to be approved by the Secretary of the Treasury, conditioned for the faithful discharge of the duties of his office.

(d) (327.) **Deputy Comptroller.** — There shall be in the Bureau of the Comptroller of the Currency, a Deputy Comptroller of the Currency, to be appointed by the Secretary, who shall be entitled to a salary of two thousand five hundred dollars a year, and who shall possess the power and perform the duties attached by law to the office of Comptroller during a vacancy in the office or during the absence or inability of the Comptroller. The Deputy Comptroller shall also take the oath of office prescribed by the Constitution and laws of the United States, and shall give a like bond in the penalty of fifty thousand dollars.

(e) (328.) **Clerks.** — The Comptroller of the Currency shall employ, from time to time, the necessary clerks, to be appointed and classified by the Secretary of the Treasury, to discharge such duties as the Comptroller shall direct. See R. S. § 169.

(f) (329.) **Neither Comptroller nor Deputy shall be interested in a National Bank.** — It shall not be lawful for the Comptroller or the Deputy Comptroller of the Currency, either directly or indirectly, to be interested in any association issuing national currency under the laws of the United States.

§ 2. (330.) **Seal.** — The seal devised by the Comptroller of the Currency for his office, and approved by the Secretary of the

<sup>2</sup> See Fed. Res. Act, Sec. 10, § 134.

Treasury, shall continue to be the seal of office of the Comptroller, and may be renewed when necessary. (A description of the seal, with an impression thereof, and a certificate of approval by the Secretary of the Treasury, shall be filed in the office of the Secretary of State.)

(884.) **His Documents. — Evidence.**<sup>1</sup> — Every certificate, assignment, and conveyance executed by the Comptroller of the Currency, in pursuance of law, and sealed with his seal of office, shall be received in evidence in all places and courts; and all copies of papers in his office, certified by him and authenticated by the said seal, shall in all cases be evidence equally with the originals. An impression of such seal directly on the paper shall be as valid as if made on wax or wafer.

§ 3. (a) (331.) **Rooms, Furniture, etc.** — There shall be assigned, from time to time, to the Comptroller of the Currency, by the Secretary of the Treasury, suitable rooms in the Treasury building for conducting the business of the Currency Bureau, containing safe and secure fire-proof vaults, in which the Comptroller shall deposit and safely keep all the plates not necessarily in the possession of engravers or printers, and other valuable things belonging to his Department; and the Comptroller shall from time to time furnish the necessary furniture, stationery, fuel, lights, and other proper conveniences for the transaction of the business of his office.

(b) (332.) **Comptroller to Examine Banks in District of Columbia.** — The Comptroller of the Currency, in addition to the powers conferred upon him by law for the examination of national banks, is further authorized, whenever he may deem it useful, to cause examination to be made into the condition of any bank in the District of Columbia organized under act of Congress. The Comptroller, at his discretion, may report to Congress the results of such examination. The expense necessarily incurred in any such examination shall be paid out of any appropriation made by Congress for special bank examinations.

(c) (333.) **Comptroller's Annual Report.** — The Comptroller of the Currency shall make an annual report to Congress, [at the commencement of its session,] exhibiting, —

First. A summary of the state and condition of every association from which reports have been received the preceeding year, at the several dates to which such reports refer, with an abstract

<sup>1</sup> § 2. §§ 201, 202, 206 a.

of the whole amount of banking capital returned by them, of the whole amount of their debts and liabilities, the amount of circulating notes outstanding, and the total amount of means and resources, specifying the amount of lawful money held by them at the times of their several returns, and such other information in relation to such associations as, in his judgment, may be useful.

Second. A statement of the associations whose business has been closed during the year, with the amount of their circulation redeemed and the amount outstanding.

Third. Any amendment to the laws relative to banking by which the system may be improved, and the security of the holders of its notes and other creditors may be increased.

Fourth. A statement exhibiting under appropriate heads the resources and liabilities and condition of the banks, banking companies, and savings banks organized under the laws of the several States and Territories; such information to be obtained by the Comptroller from the reports made by such banks, banking companies, and savings banks to the legislatures or officers of the different States and Territories, and, where such reports cannot be obtained, the deficiency to be supplied from such other authentic sources as may be available.

Fifth. The names and compensation of the clerks employed by him, and the whole amount of the expenses of the banking department during the year.

(3811.) — When the annual report of the [*Secretary of the Treasury*] [Comptroller of the Currency] upon the national banks [and banks under State and Territorial laws] is completed, or while it is in process of completion, if thereby the business may be sooner despatched, the work of printing shall be commenced, under the superintendence of the Secretary, and the whole shall be printed and ready for delivery on or before the first day of December next after the close of the year to which the report relates.

§ 4. (5158.) **United States Bonds defined.** — The term “United States bonds”, as used throughout this chapter, shall be construed to mean registered bonds of the United States.

#### ORGANIZATION AND POWERS

§ 5. (5133.) **Formation of National Banks.**<sup>1</sup> — Associations for carrying on the business of banking under this title may be

<sup>1</sup> § 5. 20 June, 1874. See § 84 a.

formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. These articles shall be signed by the persons uniting to form the association, and a copy of them shall be forwarded to the Comptroller of the Currency, to be filed and preserved in his office.<sup>2</sup> (See Rev. Sts. § 324.)

The act of June 20, 1874, chap. 343, declares "that the act entitled 'An Act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof,' approved June third, eighteen hundred and sixty-four, shall hereafter be known as 'the National Bank Act.'"

§ 6. (a) (5134.) **Certificate of Organization.**<sup>1</sup> — The persons uniting to form such an association shall, under their hands, make an organization certificate, which shall specifically state: —

(1) **Name.**<sup>2</sup> — First. The name assumed by such association, which name shall be subject to the approval of the Comptroller of the Currency.

(2) **Place.**<sup>3</sup> — Second. The place where its operations of discount and deposit are to be carried on, designating the State, Territory, or district, and the particular county and city, town, or village.

(3) **Capital.**<sup>4</sup> — Third. The amount of capital stock and the number of shares into which the same is to be divided.

(4) **Shareholders.** — Fourth. The names and places of residence of the shareholders, and the number of shares held by each of them.

(5) **Object of the Certificate.** — Fifth. The fact that the certificate is made to enable such persons to avail themselves of the advantages of this Title.

(b) (5135.) **Acknowledgment and Filing of Certificate.** — The organization certificate shall be acknowledged before a judge of some court of record, or notary public; and shall be, together with the acknowledgment thereof, authenticated by the seal of

<sup>2</sup> See *Easton v. Iowa*, 188 U. S. 220, 47 L. ed. 452, 23 Sup. Ct. 288 (1902), reversing 113 Iowa 516, 85 N. W. 795, 86 Am. St. Rep. 389; *Weinhard v. Commercial National Bank*, 41 Or. 359, 68 Pac. 806 (1902).

<sup>1</sup> § 6. See §§ 202, 206; Fed. Res. Act, Sec. 4, § 103.

<sup>2</sup> See § 81.

<sup>3</sup> See § 81.

<sup>4</sup> § 7; and see §§ 13-15, 81.

such court, or notary, transmitted to the Comptroller of the Currency, who shall record and carefully preserve the same in his office. See Rev. Sts. § 885.

§ 7. (5138.) **Capital.**<sup>1</sup>—No association shall be organized under this Title with a less capital than one hundred thousand dollars; except that banks with a capital of not less than fifty thousand dollars may, with the approval of the Secretary of the Treasury, be organized in any place the population of which does not exceed six thousand inhabitants. No association shall be organized in a city the population of which exceeds fifty thousand persons with a less capital than two hundred thousand dollars.

§ 8. (5136.) **Powers of Bank and Directors and when and where the Bank may do Business.**<sup>1</sup>—Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power, —

First. To adopt and use a corporate seal.

Second. To have succession for the period of twenty years from its organization, unless it is sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two thirds of its stock, or unless its franchise becomes forfeited by some violation of law.

Third. To make contracts.

Fourth. To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.

Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them, and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.<sup>2</sup>

<sup>1</sup> § 7. See §§ 12, 13, 14, 15, 81; Fed. Res. Act, Sec. 2, § 98.

<sup>1</sup> § 8. See § 208; Fed. Res. Act, Secs. 11, 24, 25, §§ 146, 192, 193, 199 C. 2 Abb. U. S. 416; *Casey v. Galli*, 94 U. S. 673, 24 L. ed. 168; *Main v. Second National Bank, Chicago*, 6 Biss. 26.

<sup>2</sup> Under "Fifth and "Sixth" a national bank may, by its by-laws, fix the term of office of its president for a definite term, subject to the power

Seventh. To exercise by its board of directors, or duly authorized officers<sup>3</sup> or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits;<sup>4</sup> by buying and selling exchange, coin, and bullion; by loaning money on personal security;<sup>5</sup> and by obtaining, issuing, and circulating notes according to the provisions of this title.

But no association shall transact any business except such as is incidental, and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the business of banking.

(5190.) — The usual business of each national banking association shall be transacted at an office or banking-house located in the place specified in its organization certificate.<sup>6</sup>

#### DIRECTORS AND PRESIDENT<sup>1</sup>

§§ 9 & 10. (a) (5145.) **Election of Directors.** — The affairs of each association shall be managed by not less than five directors, who shall be elected by the shareholders at a meeting to be held at any time before the association is authorized by the Comptroller of the Currency to commence the business of banking; and afterward at meetings to be held on such day in January of each year as is specified therefor in the articles of association. The directors shall hold office for one year, and until their successors are elected and have qualified.<sup>2</sup>

(b) (5146.) **Qualifications of.** — Every director must, during his whole term of service, be a citizen of the United States, and

of the directors to remove him at will at any time during the term. *Rankin v. Tygard*, 198 Fed. 795 (1912).

<sup>3</sup> The president may be authorized to discount commercial paper. *Rankin v. Tygard*, 198 Fed. 795 (1912).

<sup>4</sup> *Easton v. Iowa*, 188 U. S. 220, 47 L. ed. 452, 23 Sup. Ct. 288 (1902); *First National Bank v. American National Bank*, 173 Mo. 153, 72 S. W. 1059 (1903); *Commercial National Bank v. First National Bank*, 97 Tex. 536, 80 S. W. 601, 104 Am. St. Rep. 879 (1904).

A national Bank may receive special deposits. *First National Bank v. Henry*, 159 Ala. 367, 49 So. 97 (1905).

<sup>5</sup> See *First National Bank v. American National Bank*, 173 Mo. 153, 72 S. W. 1059 (1903); *Commercial National Bank v. First National Bank*, 97 Tex. 536, 80 S. W. 601, 104 Am. St. Rep. 879 (1904).

<sup>6</sup> *Merchant's Bank v. State Bank*, 10 Wall. 604, 19 L. ed. 1008.

<sup>1</sup> §§ 9 & 10. See § 209. <sup>2</sup> See Fed. Res. Act, Sec. 4, §§ 106, 107, 108, 111.

at least three fourths of the directors must have resided in the State, Territory, or District in which the association is located, for at least one year immediately preceding their election, and must be residents therein during their continuance in office. Every director must own, in his own right, at least ten shares of the capital stock of the association of which he is a director. Any director who ceases to be the owner of ten shares of the stock, or who becomes in any other manner disqualified, shall thereby vacate his place.

(c) (5147.) **Oath required from.** — Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this Title, and that he is the owner in good faith, and in his own right, of the number of shares of stock required by this Title, subscribed by him, or standing in his name on the books of the association, and that the same is not hypothecated, or in any way pledged, as security for any loan or debt. Such oath, subscribed by the director making it, and certified by the officer before whom it is taken, shall be immediately transmitted to the Comptroller of the Currency, and shall be filed and preserved in his office.

(d) (5148.) **Filling Vacancies.** — Any vacancy in the board shall be filled by appointment by the remaining directors, and any director so appointed shall hold his place until the next election.<sup>3</sup>

(e) (5149.) **Failure to Elect on Proper Day.** — If, from any cause, an election of directors is not made at the time appointed, the association shall not for that cause be dissolved, but an election may be held on any subsequent day, thirty days' notice thereof in all cases having been given in a newspaper published in the city, town, or county in which the association is located; and if no newspaper is published in such city, town, or county, such notice shall be published in a newspaper published nearest thereto. If the articles of association do not fix the day on which the election shall be held, or if no election is held on the day fixed, the day for the election shall be designated by the board of directors in their by-laws, or otherwise; or if the directors fail to fix the day, shareholders representing two thirds of the shares may do so.

(f) (5150.) **Election of President.** — One of the directors, to be chosen by the board, shall be the president of the board.

<sup>3</sup> See Fed. Res. Act, Sec. 4, § 111.



§ 11. (5144.) **Shareholders' Right to Vote.**— In all elections of directors, and in deciding all questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him. Shareholders may vote by proxies duly authorized in writing; but no officer, clerk, teller, or bookkeeper of such association shall act as proxy;<sup>1</sup> and no shareholder whose liability is past due and unpaid shall be allowed to vote.

§ 12. (a) (5139.) **Shares and their Transfer.**<sup>1</sup>— The capital stock<sup>2</sup> of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer<sup>3</sup> shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired.

(b) (5151.) **Liability of Shareholders.**<sup>4</sup>— The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; except that shareholders of any banking association now existing under State laws, having not less than five millions of dollars of capital actually paid in, and a surplus of twenty per centum on hand, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in their shares; and such surplus of twenty per centum shall be kept undiminished, and be in addition to the surplus provided for in this Title; and if at any time

<sup>1</sup> § 11. A "voting trust" agreement by the majority stockholders of a national bank which confers an irrevocable grant of representation by proxy upon its president, vice-president, and cashier for a definite term is in violation of U. S. Rev. Sts. § 5144. *Bridgers v. First National Bank*, 152 N. C. 293, 67 S. E. 770, 31 L. R. A. (N. S.) 1199 (1910).

<sup>1</sup> § 12. *Van Allen v. The Assessors*, 3 Wall. 573, 18 L. ed. 229. See *Lien on Shares*, §§ 212, 212 a; Fed. Res. Act, Secs. 2, 5, §§ 94, 97, 113.

<sup>2</sup> The capital stock of a national bank is the sum on which it is authorized to do business, and does not include its general deposits. *State v. Clement National Bank*, 84 Vt. 167, 78 Atl. 944, 1912D Ann. Cas. 22.

<sup>3</sup> The words "such transfer" refer to a transfer on the books of the corporation. *Jones v. Beaver National Bank*, 150 App. Div. 145 (1912), 134 N. Y. S. 776.

<sup>4</sup> §§ 212 b and 206 a; Fed. Res. Act, Secs. 2, 6, and 23, §§ 90, 117, 191.

there is a deficiency in such surplus of twenty per centum, such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency, the Comptroller of the Currency may compel the association to close its business and wind up its affairs under the provisions of chapter four of this Title.

(c) (5169.) **Comptroller's Certificate authorizing the Bank to commence Business.** — If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the Comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the Comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the Comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this Title.

(d) (5170.) **Publication of this Certificate.** — The association shall cause the certificate issued under the preceding section to be published in some newspaper printed in the city or county where the association is located, for at least sixty days next after the issuing thereof; or, if no newspaper is published in such city or county, then in the newspaper published nearest thereto.

§ 13. (a) (5142.) **Increase of Capital.**<sup>1</sup> — Any association formed under this Title may, by its articles of association, provide for an increase of its capital from time to time, as may be deemed expedient, subject to the limitations of this Title. But the maximum of such increase to be provided in the articles of association shall be determined by the Comptroller of the Currency; and no increase of capital shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the Comptroller of the Currency, and his certificate obtained specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association.

<sup>1</sup> § 13. § 213 a, b, c. See § 81; Fed. Res. Act, Secs. 5, §§ 112, 113.

(b) (5143.) **Reduction of Capital.**<sup>2</sup> — Any association formed under this Title may, by the vote of shareholders owning two thirds of its capital stock, reduce its capital to any sum not below the amount required by this title to authorize the formation of associations; but no such reduction shall be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any such reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and his approval thereof obtained.

§ 14. (5140.) **Capital Stock. — How Paid and Proved.** — At least fifty per centum of the capital stock of every association shall be paid in before it shall be authorized to commence business<sup>1</sup>; and the remainder of the capital stock of such association shall be paid in instalments of at least ten per centum each,<sup>1</sup> on the whole amount of the capital, as frequently as one instalment at the end of each succeeding month from the time it shall be authorized by the Comptroller of the Currency to commence business; and the payment of each instalment shall be certified to the Comptroller, under oath, by the president or cashier of the association.<sup>2</sup>

§ 15. (5141.) **Delinquent Shareholder.** — Whenever any shareholder, or his assignee, fails to pay any instalment on the stock when the same is required by the preceding section to be paid, the directors of such association may sell the stock of such delinquent shareholder at public auction, having given three weeks' previous notice thereof in a newspaper published and of general circulation in the city or county where the association is located, or if no newspaper is published in said city or county, then in a newspaper published nearest thereto, to any person who will pay the highest price therefor, to be not less than the amount then due thereon, with the expenses of advertisement and sale; and the excess, if any, shall be paid to the delinquent shareholder. If no bidder can be found who will pay for such stock the amount due thereon to the association, and the cost of advertisement and sale, the amount previously paid shall be forfeited to the association, and such stock shall be sold as the directors may order, within six months from the time of such forfeiture, and if not sold

<sup>2</sup> § 213 *d.* See Fed. Res. Act, Secs. 5, 6, 28, §§ 112, 116, 117, 197.

<sup>1</sup> § 14. *Weinhard v. Commerical National Bank*, 41 Or. 359, 68 Pac. 806 (1902).

<sup>2</sup> See Fed. Res. Act, Secs. 2 and 9, §§ 89, 92, 121.

it shall be cancelled and deducted from the capital stock of the association. If any such cancellation and reduction shall reduce the capital of the association below the minimum of capital required by law, the capital stock shall, within thirty days from the date of such cancellation, be increased to the required amount; in default of which a receiver may be appointed, according to the provisions of section fifty-two hundred and thirty-four, to close up the business of the association.<sup>1</sup>

§ 16. (a) (5159.) **Bonds to be deposited as Security for Circulation.**<sup>1</sup> — Every association, after having complied with the provisions of this Title, preliminary to the commencement of the banking business, and before it shall be authorized to commence banking business under this Title, shall transfer and deliver to the Treasury of the United States any United States registered bonds, bearing interest, to an amount not less than thirty thousand dollars and not less than one third of the capital stock paid in. Such bonds shall be received by the Treasurer upon deposit, and shall be by him safely kept in his office, until they shall be otherwise disposed of, in pursuance of the provisions of this Title.

(b) (5160.) **Increase or Reduction of this Deposit.**<sup>2</sup> — The deposit of bonds made by each association shall be increased as its capital may be paid up or increased, so that every association shall at all times have on deposit with the Treasurer registered United States bonds to the amount of at least one third of its capital stock actually paid in. And any association that may desire to reduce its capital or to close up its business and dissolve its organization, may take up its bonds upon returning to the Comptroller its circulating notes in the proportion hereinafter required, or may take up any excess of bonds beyond one third of its capital stock, and upon which no circulating notes have been delivered.

(c) (5161.) **Exchange of Bonds.** — To facilitate a compliance with the two preceding sections, the Secretary of the Treasury is authorized to receive from any association, and cancel, any United States coupon bonds, and to issue in lieu thereof registered

<sup>1</sup> § 15. A statute of a state authorizing a judgment creditor of a corporation to enforce payment by a stockholder of his unpaid subscription, is not available to a judgment creditor of a national bank, since its enforcement would impair the remedy of U. S. Rev. Sts. § 5141. *McQuiddy v. King*, 191 Ala. 205, 67 So. 1015 (1915).

<sup>1</sup> § 16. 20 June, 1874. See §§ 76, 84 (a). Repealed by Fed. Res. Act, § 168.

<sup>2</sup> See §§ 76, 168, 169.

bonds of like amount, bearing a like rate of interest, and having the same time to run.

§ 17. (5168.) **Comptrollers' Examination before authorizing Bank to begin Business.** — Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this Title, and the association transmitting the same notifies the Comptroller that at least fifty per centum of its capital stock has been duly paid in, and that such association has complied with all the provisions of this Title required to be complied with before an association shall be authorized to commence the business of banking, the Comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this Title required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the Comptroller to determine whether the association is lawfully entitled to commence the business of banking.

§ 18. (5169.) See § 12 *c*.

(5170.) See § 12 *d*.

§ 19. (a) (5162.) **Transfers of Bonds, how made.** — All transfers of United States bonds, made by any association under the provisions of this Title, shall be made to the Treasurer of the United States in trust for the association, with a memorandum written or printed on each bond, and signed by the cashier, or some other officer of the association making the deposit. A receipt shall be given to the association, by the Comptroller of the Currency, or by a clerk appointed by him for that purpose, stating that the bond is held in trust for the association on whose behalf the transfer is made, and as security for the redemption and payment of any circulating notes that have been or may be delivered to such association. No assignment or transfer of any such bond by the Treasurer shall be deemed valid unless countersigned by the Comptroller of the Currency.

(b) (5163.) **Registry of Transfers.**<sup>1</sup> — The Comptroller of the Currency shall keep in his office a book in which he shall cause to be entered, immediately upon countersigning it, every transfer

<sup>1</sup> § 19. See § 84 A, Sec. 4.

or assignment by the Treasurer, of any bonds belonging to a national banking association, presented for his signature. He shall state in such entry the name of the association from whose accounts the transfer is made, the name of the party to whom it is made, and the par value of the bonds transferred.

(c) (5164.) **Notice of Transfer to the Bank.**<sup>1</sup> — The Comptroller of the Currency shall, immediately upon countersigning and entering any transfer or assignment by the Treasurer of any bonds belonging to a national banking association, advise by mail the association from whose accounts the transfer is made of the kind and numerical designation of the bonds, and the amount thereof so transferred.

See (5163), §§ 19 and 25.

§ 20. (5165.) **Examination of Registry and Bonds.**<sup>1</sup> — The Comptroller of the Currency shall have at all times, during office hours, access to the books of the Treasurer of the United States for the purpose of ascertaining the correctness of any transfer or assignment of the bonds deposited by an association, presented to the Comptroller to countersign; and the Treasurer shall have the like access to the book mentioned in section fifty-one hundred and sixty-three, during office hours, to ascertain the correctness of the entries in the same; and the Comptroller shall also at all times have access to the bonds on deposit with the Treasurer, to ascertain their amount and condition.

§ 21. (5171.) **Circulating Notes, Delivery of.**<sup>1</sup> — Upon a deposit of bonds as prescribed by sections fifty-one hundred and fifty-nine and fifty-one hundred and sixty, the association making the same shall be entitled to receive from the Comptroller of the Currency circulating notes of different denominations, in blank, registered and countersigned as hereinafter provided, equal in amount to ninety per centum of the current market value of the United States bonds so transferred and delivered, but not exceeding ninety per centum of the amount of the bonds at the par value thereof, if bearing interest at a rate not less than five per centum per annum: *Provided*, That the amount of circulating notes to be furnished to each association shall be in proportion to its paid-up capital, as follows, and no more: —

First. To each association whose capital does not exceed five hundred thousand dollars, ninety per centum of such capital.

<sup>1</sup> § 20. See (5163), §§ 19, 84 A, Sec. 4.

<sup>1</sup> § 21. Repealed. See § 76; Fed. Res. Act, Sec. 18, § 171.

Second. To each association whose capital exceeds five hundred thousand dollars, but does not exceed one million of dollars, eighty per centum of such capital.

Third. To each association whose capital exceeds one million of dollars, but does not exceed three millions of dollars, seventy-five per centum of such capital.

Fourth. To each association whose capital exceeds three millions of dollars, sixty per centum of such capital.

§ 22. (a) (5172.) **Circulating Notes. Denomination. Form. Printing.**<sup>1</sup> — In order to furnish suitable notes for circulation, the Comptroller of the Currency shall, under the direction of the Secretary of the Treasury, cause plates and dies to be engraved, in the best manner to guard against counterfeiting and fraudulent alterations, and shall have printed therefrom, and numbered, such quantity of circulating notes, in blank, of the denominations of one dollar, two dollars, three dollars, five dollars, ten dollars, twenty dollars, fifty dollars, one hundred dollars, five hundred dollars, and one thousand dollars, as may be required to supply the associations entitled to receive the same. Such notes shall express upon their face that they are secured by United States bonds, deposited with the Treasurer of the United States, by the written or engraved signatures of the Treasury and Register, and by the imprint of the seal of the Treasury; and shall also express upon their face the promise of the association receiving the same to pay on demand, attested by the signatures of the president or vice-president and cashier; and shall bear such devices and such other statements, and shall be in such form, as the Secretary of the Treasury shall, by regulation, direct.

(b) (5175.) **Limit of Issue of Notes under Five Dollars.** — Not more than one sixth part of the notes furnished to any association shall be of a less denomination than five dollars. After specie payments are resumed no association shall be furnished with notes of a less denomination than five dollars.

(c) (5176.) **Limit of Circulation of certain Banks.**<sup>2</sup> — No banking association organized subsequent to the twelfth day of July, eighteen hundred and seventy, shall have a circulation in excess of five hundred thousand dollars.

<sup>1</sup> § 22. 20 June, 1874. See § 84 *a*, and Rev. Sts. §§ 5415 and 5434. See Fed. Res. Act, Sec. 27, § 195, § 84 A, Sec. 11.

<sup>2</sup> Repealed. See § 76.

(d) (5177.) **Limit to Aggregate Circulation.**<sup>3</sup> — [*The aggregate amount of circulating notes issued under the act of February twenty-five, eighteen hundred and sixty-three, and under the act of June three, eighteen hundred and sixty-four, and under section one of the act of July twelve, eighteen hundred and seventy, and under this Title, shall not exceed three hundred and fifty-four millions of dollars.*]

(e) (5178.) **Appointment of the Circulation.**<sup>4</sup> — One hundred and fifty millions of dollars of the entire amount of circulating notes authorized to be issued shall be apportioned to associations in the States, in the Territories, and in the District of Columbia, according to representative population. One hundred and fifty millions shall be apportioned by the Secretary of the Treasury among associations formed in the several States, in the Territories, and in the District of Columbia, having due regard to the existing banking capital, resources, and business of such States, Territories, and Districts. The remaining fifty-four millions shall be apportioned among associations in States and Territories having, under the apportionments above prescribed, less than their full proportion of the aggregate amount of notes authorized, which made due application for circulating notes prior to the twelfth day of July, eighteen hundred and seventy-one. Any remainder of such fifty-four millions shall be issued to banking associations applying for circulating notes in other States or Territories having less than their proportion.

(5179.)<sup>5</sup> — In order to secure a more equitable distribution of the national banking currency, there may be issued circulating notes to banking associations organized in States and Territories having less than their proportion, and the amount of circulation herein authorized shall, under the direction of the Secretary of the Treasury, as it may be required for this purpose, be withdrawn, as herein provided, from banking associations organized in States having more than their proportion, but the amounts so withdrawn shall not exceed twenty-five million dollars: *Provided*, That no circulation shall be withdrawn under the provisions of this section until after the fifty-four millions granted in the first section of the act of July twelfth, eighteen hundred and seventy, shall have been taken up.

<sup>3</sup> The limitation upon the circulation of national bank notes was removed by the statute of January 14, 1875. See § 84 b.

<sup>4</sup> 20 June, 1874. See § 84 a.

<sup>5</sup> 20 June, 1874. See § 84 a.



(5180.) — The Comptroller of the Currency shall, under the direction of the Secretary of the Treasury, make a statement showing the amount of circulation in each State and Territory, and the amount necessary to be withdrawn from each association, and shall forthwith make a requisition for such amount upon such associations, commencing with those having a circulation exceeding one million of dollars, in States having an excess of circulation, and withdrawing their circulation in excess of one million of dollars, and then proceeding proportionately with other associations having a circulation exceeding three hundred thousand dollars, in States having the largest excess of circulation, and reducing the circulation of such associations in States having the greatest proportion in excess, leaving undisturbed the associations in States having a smaller proportion, until those in greater excess have been reduced to the same grade, and continuing thus to make such reductions until the full amount of twenty-five millions has been withdrawn; and the circulation so withdrawn shall be distributed among the States and Territories having less than their proportion, so as to equalize the same. Upon failure of any association to return the amount of circulating notes so required, within one year, the Comptroller shall sell at public auction, having given twenty days' notice thereof in one daily newspaper printed in Washington and one in New York City, an amount of the bonds deposited by that association as security for its circulation, equal to the circulation required to be withdrawn from the association and not returned in compliance with such requisition; and he shall, with the proceeds, redeem so many of the notes of such association, as they come into the Treasury, as will equal the amount required and not returned; and shall pay the balance, if any, to the association.

(f) (5181.) **Removal of Bank to another State to aid Apportionment of Circulation.** — Any association located in any State having more than its proportion of circulation may be removed to any State having less than its proportion of circulation, under such rules and regulations as the Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall prescribe: *Provided*, That the amount of the issue of said banks shall not be deducted from the issue of fifty-four millions mentioned in section five thousand one hundred and seventy-eight.

§ 23. (5182.) **Bank Notes, for what Demands received.** — After any association receiving circulating notes under this Title has caused its promise to pay such notes on demand to be signed

by the president or vice-president and cashier thereof, in such manner as to make them obligatory promissory notes, payable on demand, at its place of business, such association may issue and circulate the same as money. And the same shall be received at par in all parts of the United States in payment of taxes, excises, public lands, and all other dues to the United States, except duties on imports; and also for all salaries and other debts and demands owing by the United States to individuals, corporations, and associations within the United States, except interest on the public debt, and in redemption of the national currency.

(b) (5183.) **Issue of other Notes prohibited.**<sup>1</sup>—No national banking association shall issue [post notes or] any other notes to circulate as money than such as are authorized by the provisions of this Title.

§ 24. (a) (5184.) **Mutilated and Worn Notes.**—It shall be the duty of the Comptroller of the Currency to receive worn-out or mutilated circulating notes issued by any banking association, and also, on due proof of the destruction of any such circulating notes, to deliver in place thereof to the association other blank circulating notes to an equal amount. Such worn-out or mutilated notes, after a memorandum has been entered in the proper books, in accordance with such regulations as may be established by the Comptroller, as well as all circulating notes which shall have been paid or surrendered to be cancelled, shall be burned to ashes in presence of four persons, one to be appointed by the Secretary of the Treasury, one by the Comptroller of the Currency, one by the Treasurer of the United States, and one by the association, under such regulations as the Secretary of the Treasury may prescribe. A certificate of such burning, signed by the parties so appointed, shall be made in the books of the Comptroller, and a duplicate thereof forwarded to the association whose notes are thus cancelled.

(b) (5185.) **Gold Notes. — Authority to Issue.**<sup>1</sup>—Associations may be organized in the manner prescribed by this Title for the purpose of issuing notes payable in gold; and upon the deposit of any United States bonds bearing interest payable in gold with the Treasurer of the United States, in the manner prescribed for other associations, it shall be lawful for the Comptroller of the Currency to issue to the association making the deposit circulating

<sup>1</sup> § 23. 18 February, 1875. See § 84 *e*.

<sup>1</sup> § 24. See Fed. Res. Act, Sec. 18, § 172.

notes of different denominations, but none of them of less than five dollars, and not exceeding in amount eighty per centum of the par value of the bonds deposited, which shall express the promise of the association to pay them, upon presentation at the office at which they are issued, in gold coin of the United States, and shall be so redeemable. But no such association shall have a circulation of more than one million of dollars.<sup>2</sup>

(c) (5186.) **Reserve Fund of Gold Note Banks, and Duty to receive Notes of other Associations.** <sup>3</sup>— Every association organized under the preceding section shall at all times keep on hand not less than twenty-five per centum of its outstanding circulation, in gold or silver coin of the United States; and shall receive at par in the payment of debts the gold notes of every other such association which at the time of such payment is redeeming its circulating notes in gold coin of the United States, and shall be subject to all the provisions of this Title: *Provided*, that, in applying the same to associations organized for issuing gold notes, the terms “lawful money” and “lawful money of the United States” shall be construed to mean gold or silver coin of the United States; and the circulation of such associations shall not be within the limitation of circulation mentioned in this Title.

§ 25. (5166.) **Annual Examination of Bonds by Associations.**<sup>1</sup>— Every association having bonds deposited in the office of the Treasurer of the United States shall, once or oftener in each fiscal year, examine and compare the bonds pledged by the association with the books of the Comptroller of the Currency and with the accounts of the association, and, if they are found correct, to execute to the Treasurer a certificate setting forth the different kinds and the amounts thereof, and that the same are in the possession and custody of the Treasurer at the date of the certificate. Such examination shall be made at such time or times, during the ordinary business hours, as the Treasurer and the Comptroller, respectively, may select, and may be made by an officer or agent of such association, duly appointed in writing for that purpose; and his certificate before mentioned shall be of like force and validity as if executed by the president or cashier. A duplicate of

<sup>2</sup> Statute of 19 January, 1875, c. 19, removed the limitation imposed by the last sentence of this section upon associations authorized to issue circulating notes payable in gold coin. See §§ 65 and 84 c.

<sup>3</sup> See § 78.

<sup>1</sup> § 25. See 84 A, Sec. 4.

such certificate, signed by the Treasurer, shall be retained by the association.

§ 26. (5167.) **Interest on the Bonds, and Custody of Them.**<sup>1</sup> — The bonds transferred to and deposited with the Treasurer of the United States, by any association, for the security of its circulating notes, shall be held exclusively for that purpose, until such notes are redeemed, except as provided in this Title. The Comptroller of the Currency shall give to any such association powers of attorney to receive and appropriate to its own use the interest on the bonds which it has so transferred to the Treasurer; but such powers shall become inoperative whenever such association fails to redeem its circulating notes. Whenever the market or cash value of any bonds thus deposited with the Treasurer is reduced below the amount of the circulation issued for the same, the Comptroller may demand and receive the amount of such depreciation in other United States bonds at cash value, or in money, from the association, to be deposited with the Treasurer as long as such depreciation continues. And the Comptroller, upon the terms prescribed by the Secretary of the Treasury, may permit an exchange to be made of any of the bonds deposited with the Treasurer by any association, for other bonds of the United States authorized to be received as security for circulating notes, if he is of opinion that such an exchange can be made without prejudice to the United States; and he may direct the return of any bonds to the association which transferred the same, in sums of not less than one thousand dollars, upon the surrender to him and the cancellation of a proportionate amount of such circulating notes: *Provided*, That the remaining bonds which shall have been transferred by the association offering to surrender circulating notes are equal to the amount required for the circulating notes not surrendered by such association, and that the amount of bonds in the hands of the Treasurer is not diminished below the amount required to be kept on deposit with him, and that there has been no failure by the association to redeem its circulating notes, nor any other violation by it of the provisions of this Title, and that the market or cash value of the remaining bonds is not below the amount required for the circulation issued for the same.

§ 27. (5187.) **Penalties for imitating or defacing Notes or issuing them to unauthorized Associations.** — No officer acting under the provisions of this Title shall countersign or deliver to

<sup>1</sup> § 26. See Fed. Res. Act, Sec. 18, §§ 169-172, 84 A, Sec. 4.

any association, or to any other company or person, any circulating notes contemplated by this Title, except in accordance with the true intent and meaning of its provisions. Every officer who violates this section shall be deemed guilty of a high misdemeanor, and shall be fined not more than double the amount so countersigned and delivered, and imprisoned not less than one year and not more than fifteen years.

(5188.) — It shall not be lawful to design, engrave, print, or in any manner make or execute, or to utter, issue, distribute, circulate, or use, any business or professional card, notice, placard, circular, hand-bill, or advertisement, in the likeness or similitude of any circulating note or other obligation or security of any banking association organized or acting under the laws of the United States which has been or may be issued under this Title, or any act of Congress, or to write, print, or otherwise impress upon any such note, obligation, or security any business or professional card, notice or advertisement, or any notice or advertisement of any matter or thing whatever. Every person who violates this section shall be liable to a penalty of one hundred dollars, recoverable one half to the use of the informer.

(5189.) — Every person who mutilates, cuts, defaces, disfigures, or perforates with holes, or unites or cements together, or does any other thing to any bank bill, draft, note, or other evidence of debt, issued by any national banking association, or who causes or procures the same to be done, with intent to render such bank bill, draft, note, or other evidence of debt unfit to be reissued by said association, shall be liable to a penalty of fifty dollars, recoverable by the association.

§ 28. (5137.) **Realty, Power to hold.**<sup>1</sup> — A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others: —

First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

Fourth. Such as it shall purchase at sales under judgments,

<sup>1</sup> § 28. § 228. *Kansas Valley Bank v. Rowell*, 2 Dill. 371. See Fed. Res. Act, Sec. 24, § 192, which authorizes loans secured by improved and unencumbered farm lands, situated within its Federal reserve district.

decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years.

§ 29. (5200.) **Limit of Liability of one Person or Firm.**<sup>1</sup> — The total liabilities to any association, of any person, or of any company, corporation, or firm for money borrowed, including, in the liabilities of a company or firm, the liabilities of the several members thereof, shall at no time exceed one tenth part of the amount of the capital stock of such association actually paid in.<sup>2</sup> But the discount of bills of exchange drawn in good faith against actually existing values, and the discount of commercial or business paper actually owned by the person negotiating the same, shall not be considered as money borrowed.

§ 30. (5197.) **Interest, what Rate may be taken.**<sup>1</sup> — Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or district where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue<sup>2</sup> organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this Title. When no rate is fixed by the laws of the State, or Territory, or district, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the purchase, discount, or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

(5198.) **Usury, Consequences of.**<sup>3</sup> — The taking, receiving,

<sup>1</sup> § 29. § 229. See Fed. Res. Act, Sec. 9, §§ 124, 125; Act June 22, 1906, c. 3516, 34 Stat. 451.

<sup>2</sup> See *Ultra vires*, Legislative Intent; Act June 22, 1906, *supra*.

<sup>1</sup> § 30. § 230. *Tiffany v. National Bank of Missouri*, 18 Wall. 409, 21 L. ed. 862; *In re Alfred Wild*, 11 Blatchf. 243. See Fed. Res. Act, Secs. 11 (b), 11 (c), 13, 16, §§ 137, 138, 153, 161.

<sup>2</sup> See § 230 z.

<sup>3</sup> § 230. 18 February, 1875. See for full text, § 84 e; Fed. Res. Act,

reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred.<sup>4</sup> [That suits, actions, and proceedings against any association under this title may be had in any Circuit, District, or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.]

§ 31. (5191.) **Reserve and what may be counted toward it.**<sup>1</sup>

— Every national banking association in either of the following cities: Albany, Baltimore, Boston, Cincinnati, Chicago, Cleveland, Detroit, Louisville, Milwaukee, New Orleans, New York, Philadelphia, Pittsburgh, Saint Louis, San Francisco, and Washington, shall at all times have on hand, in lawful money of the United States, an amount equal to at least twenty-five per centum of the aggregate amount of its notes in circulation and its deposits; and every other association shall at all times have on hand, in lawful money of the United States, an amount equal to at least fifteen per centum of the aggregate amount of its notes in circulation and of its deposits. Whenever the lawful money of any association in any of the cities named shall be below the amount of twenty-five per centum of its circulation and deposits, and whenever the lawful money of any other association shall be below fifteen

Sec. 9, §§ 124, 125; *Farmers', etc. Bank v. Dearing*, 91 U. S. 29, 23 L. ed. 196.

<sup>4</sup> Two separate and distinct classes of actions are contemplated by this section. *First National Bank v. Langston*, 32 Okla. 795, 124 Pac. 308 (1912).

<sup>1</sup> § 31. 20 June, 1874, § 84 *a.* 1 March, 1872. See §§ 78, 83; Fed. Res. Act, Secs. 19, 20, 27, §§ 173-184, 195; 199 B.

The object of section 5191 is to insure a constant presence of a cash reserve. But this provision of statute was not intended to protect a bank against bad loans, and a loss resulting from the non-payment of such loans cannot be said to be caused by the directors' violation of law. *Allen v. Luke*, 163 Fed. 1008 (1908).

per centum of its circulation and deposits, such association shall not increase its liabilities by making any new loans or discounts otherwise than by discounting or purchasing bills of exchange payable at sight, nor make any dividend of its profits until the required proportion between the aggregate amount of its outstanding notes of circulation and deposits and its lawful money of the United States has been restored. And the Comptroller of the Currency may notify any association, whose lawful money reserve shall be below the amount above required to be kept on hand, to make good such reserve; and if such association shall fail for thirty days thereafter so to make good its reserve of lawful money, the Comptroller may, with the concurrence of the Secretary of the Treasury, appoint a receiver to wind up the business of the association, as provided in section fifty-two hundred and thirty-four.<sup>2</sup>

(5192.)<sup>3</sup> — Three fifths of the reserve of fifteen per centum required by the preceding section to be kept, may consist of balances due to an association, available for the redemption of its circulating notes, from associations approved by the Comptroller of the Currency, organized under the act of June three, eighteen hundred and sixty-four, or under this Title, and doing business in the cities of Albany, Baltimore, Boston, Charleston, Chicago, Cincinnati, Cleveland, Detroit, Louisville, Milwaukee, New Orleans, New York, Philadelphia, Pittsburgh, Richmond, Saint Louis, San Francisco, and Washington. Clearing-house certificates, representing specie or lawful money specially deposited for the purpose, of any clearing-house association, shall also be deemed to be lawful money in the possession of any association belonging to such clearing-house, holding and owning such certificate, within the preceding section.

(5193.)<sup>4</sup> — The Secretary of the Treasury may receive United States notes on deposit, without interest, from any national banking associations, in sums of not less than ten thousand dollars, and issue certificates therefor in such form as he may pre-

<sup>2</sup> If one gives a note to a bank for the purpose of deceiving the Comptroller as to the amount of reserve, one is liable on such note when the bank goes into the hands of a receiver. *Elliott v. Peet*, 192 Fed. 699 (1912); *id.*, 202 Fed. 434 (1913); *National Citizens' Bank v. Bowen*, 109 Minn. 473, 124 N. W. 241 (1910); but if one *bona fide* gives an accommodation note to the bank one is not liable thereon to the receiver. *Westwater v. Lyons*, 193 Fed. 817 (1912).

<sup>3</sup> 20 June, 1874, § 84 *a*. See § 83.

<sup>4</sup> 8 June, 1872.



scribe, in denominations of not less than five thousand dollars, and payable on demand in United States notes at the place where the deposits were made. The notes so deposited shall not be counted as part of the lawful money reserve of the association; but the certificates issued therefor may be counted as part of its lawful money reserve, and may be accepted in the settlement of clearing-house balances at the places where the deposits therefor were made.

(5194.) — The power conferred on the Secretary of the Treasury, by the preceding section, shall not be exercised so as to create any expansion or contraction of the currency. And United States notes for which certificates are issued under that section, or other United States notes of like amount, shall be held as special deposits in the Treasury, and used only for the redemption of such certificates.

§ 32. (a) (5195.) **Place for Redemption of Notes.**<sup>1</sup> — Each association organized in any of the cities named in section fifty-one hundred and ninety-one shall select, subject to the approval of the Comptroller of the Currency, an association in the city of New York, at which it will redeem its circulating notes at par; and may keep one half of its lawful money reserve in cash deposits in the city of New York. But the foregoing provision shall not apply to associations organized and located in the city of San Francisco for the purpose of issuing notes payable in gold. Each association not organized within the cities named shall select, subject to the approval of the Comptroller, an association in either of the cities named, at which it will redeem its circulating notes at par. The Comptroller shall give public notice of the names of the associations selected, at which redemptions are to be made by the respective associations, and of any change that may be made of the association at which the notes of any association are redeemed. Whenever any association fails either to make the selection or to redeem its notes as aforesaid, the Comptroller of the Currency may, upon receiving satisfactory evidence thereof, appoint a receiver, in the manner provided for in section fifty-two hundred and thirty-four, to wind up its affairs. But this section shall not relieve any association from its liability to redeem its circulating notes at its own counter, at par, in lawful money on demand.

(b) (5196.) **National Bank's Duty to receive the Notes of other National Banks at Par, except.**<sup>2</sup> — Every national banking

<sup>1</sup> § 32. 20 June, 1874, § 84 a. See § 83.

<sup>2</sup> 12 July, 1870.

association formed or existing under this Title shall take and receive at par, for any debt or liability to it, any and all notes or bills issued by any lawfully organized national banking association. But this provision shall not apply to any association organized for the purpose of issuing notes payable in gold.

§ 33. (5199.) **Dividends<sup>1</sup> declared by Directors.**—The directors of any association may, semiannually, declare a dividend of so much of the net profits<sup>2</sup> of the association as they shall judge expedient; but each association shall, before the declaration of a dividend, carry one tenth part of its net profits of the preceding half-year to its surplus fund, until the same shall amount to twenty per centum of its capital stock.

§ 34. (5211.) **Reports to Comptroller.<sup>1</sup>**—Every association shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association, and attested by the signature of at least three of the directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the [associations] [association] at the close of business on any past day by him specified; and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him, and in the same form in which it is made to the Comptroller shall be published in a newspaper published in the place where such association is established, or, if there is no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the Comptroller. The Comptroller shall also have power to call for special reports from any particular association whenever, in his judgment, the same are necessary in order to a full and complete knowledge of its condition.

<sup>1</sup> § 33. See Fed. Res. Act, Sec. 7, § 118.

<sup>2</sup> Funds set apart upon the reduction of the capital stock of a bank for the purpose of charging off bad, doubtful and unproductive assets, while not technically net profits, yet are the equivalent of net profits. *Cogswell v. Second National Bank*, 78 Conn. 75, 60 Atl. 1059 (1905), affirmed in 204 U. S. 1, 51 L. ed. 343, 27 Sup. Ct. 241; and a note of directors in setting apart such a fund is simply a form of declaring dividends from assets in excess of capital stock. *Ibid.*

<sup>1</sup> § 34. 30 June, 1876. See § 84 *g* and § 66; Fed. Res. Act, Sec. 9, 11 (a), §§ 124, 125, 136.

(5212.) — **Report as to Dividends.**<sup>2</sup> — In addition to the reports required by the preceding section, each association shall report to the Comptroller of the Currency, within ten days after declaring any dividend, the amount of such dividend, and the amount of net earnings in excess of such dividend. Such reports shall be attested by the oath of the president or cashier of the association.

(5213.) — **Penalty for Failure to make Reports.**<sup>3</sup> — Every association which fails to make and transmit any report required under either of the two preceding sections shall be subject to a penalty of one hundred dollars for each day after the periods, respectively, therein mentioned, that it delays to make and transmit its report. Whenever any association delays or refuses to pay the penalty herein imposed, after it has been assessed by the Comptroller of the Currency, the amount thereof may be retained by the Treasurer of the United States, upon the order of the Comptroller of the Currency, out of the interest, as it may become due to the association, on the bonds deposited with him to secure circulation. All sums of money collected for penalties under this section shall be paid into the Treasury of the United States.

30 June, 1876, Sec. 6. That all savings banks or savings and trust companies organized under authority of any act of Congress shall be, and are hereby, required to make, to the Comptroller of the Currency, and publish, all the reports which national banking associations are required to make and publish under the provisions of sections fifty-two hundred and eleven, fifty-two hundred and twelve, and fifty-two hundred and thirteen, of the Revised Statutes, and shall be subject to the same penalties for failure to make or publish such reports as are therein provided; which penalties may be collected by suit before any court of the United States in the district in which said savings banks or savings and trust companies may be located. And all savings or other banks now organized, or which shall hereafter be organized, in the District of Columbia, under any act of Congress, which shall have capital stock paid up in whole or in part, shall be subject to all the provisions of the Revised Statutes, and of all acts of Congress applicable to national banking associations, so far as the same may be applicable to such savings or other banks: *Provided*, That such savings banks now established shall not be required to have a paid-in capital exceeding one hundred thousand dollars.

<sup>2</sup> See Fed. Res. Act, Sec. 9, §§ 124, 125.

<sup>3</sup> 30 June, 1876. See § 84 *g*. See Fed. Res. Act, Sec. 9, §§ 124, 125.

§ 35. (5201.) **Banks not to loan on or purchase their own Stock.**<sup>1</sup> — No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association, according to section fifty-two hundred and thirty-four.

§ 36. (5202.) **Limit to Bank's Indebtedness.**<sup>1</sup> — No association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following: —

First. Notes of circulation.

Second. Moneys deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserved profits.

§ 37. (5203.) **Not to use Circulation to increase Capital.**<sup>1</sup> — No association shall, either directly or indirectly, pledge or hypothecate any of its notes or circulation, for the purpose of procuring money to be paid in on its capital stock, or to be used in its banking operations, or otherwise; nor shall any association use its circulating notes, or any part thereof, in any manner or form, to create or increase its capital stock.

§ 38. (a) (5204.) **Not to withdraw Capital.**<sup>1</sup> — No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. If losses have at any time been sustained by any such association, equal to or exceeding its undivided profits then on hand, no dividend shall be made; and no dividend shall ever be made by any association, while it continues its banking operations, to an amount greater than its net profits then on hand, deducting

<sup>1</sup> § 35. § 235. *Bank v. Lanier*, 11 Wall. 369, 20 L. ed. 172; *Bullard v. Bank*, 18 Wall. 589, 21 L. ed. 923. See Fed. Res. Act, Sec. 9, §§ 124, 125.

<sup>1</sup> § 36. See Fed. Res. Act, Sec. 13, § 153.

<sup>1</sup> § 37. See Fed. Res. Act, Sec. 6, § 113.

<sup>1</sup> § 38. See Fed. Res. Act, Sec. 6, § 117.

therefrom its losses and bad debts. All debts due to any association, on which interest is past due and unpaid for a period of six months, unless the same are well secured, and in process of collection, shall be considered bad debts within the meaning of this section. But nothing in this section shall prevent the reduction of the capital stock of the association under section fifty-one hundred and forty-three.

(b) (5205.) **Enforcing Payment of Deficiency in Capital Stock.**<sup>2</sup> — Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders pro rata for the amount of capital stock held by each;<sup>3</sup> and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four. [*And provided*, That if any shareholder or shareholders of such bank shall neglect or refuse, after three months' notice, to pay the assessment, as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto) to make good the deficiency, and the balance, if any, shall be returned to such delinquent shareholder or shareholders.]

§ 39. (5206.) **Restriction on Use of Notes of other Banks.** — No association shall at any time pay out on loans or discounts, or in purchasing drafts or bills of exchange, or in payment of deposits, or in any other mode pay or put in circulation, the notes

<sup>2</sup> 30 June, 1876. See § 84 *g*.

<sup>3</sup> See *Weinhard v. Commercial National Bank*, 41 Or. 359, 68 Pac. 806 (1902), affirmed, 192 U. S. 243, 48 L. ed. 425, 24 Sup. Ct. 253.

of any bank or banking association which are not, at any such time, receivable, at par, on deposit and in payment of debts, by the association so paying out or circulating such notes; nor shall any association knowingly pay out or put in circulation any notes issued by any bank or banking association which at the time of such paying out or putting in circulation is not redeeming its circulating notes in lawful money of the United States.

(5207.) **Notes of United States not to be held as collateral.**<sup>1</sup> — No association shall hereafter offer or receive United States notes or national bank notes as security or as collateral security for any loan of money, or for a consideration agree to withhold the same from use, or offer or receive the custody or promise of custody of such notes as security, or as collateral security, or consideration for any loan of money. Any association offending against the provisions of this section shall be deemed guilty of a misdemeanor, and shall be fined not more than one thousand dollars and a further sum equal to one third of the money so loaned. The officer or officers of any association who shall make any such loan shall be liable to a further sum equal to one quarter of the money loaned; and any fine or penalty incurred by a violation of this section shall be recoverable for the benefit of the party bringing such suit.

§ 40. (5210.) **List of Shareholders.** — The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders<sup>1</sup> and creditors of the association, and the officers authorized to assess taxes under State authority, during business hours of each day in which business may be legally transacted. A copy of such list, on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the Comptroller of the Currency.

§ 41. (5173.) **Plates and Dies.**<sup>1</sup> — The plates and special dies to be procured by the Comptroller of the Currency for the printing

<sup>1</sup> § 39. February, 1869. See § 78, and Fed. Res. Act, Sec. 16, § 157.

<sup>1</sup> § 40. A *bona fide* stockholder's motive in wishing to inspect the list is wholly immaterial. *Murray v. Walker*, 156 Ky. 536, 161 S. W. 512, 1915C Ann. Cas. 363, n.; and he may make and carry away an extract therefrom for a proper purpose. *Lorge v. Consolidated National Bank*, 105 App. Div. 409 (1905), 94 N. Y. S. 173.

<sup>1</sup> § 41. See Fed. Res. Act, Sec. 16, § 164.

of such circulating notes shall remain under his control and direction, and the expenses necessarily incurred in executing the laws respecting the procuring of such notes, and all other expenses of the Bureau of the Currency, shall be paid out of the proceeds of the taxes or duties assessed and collected on the circulation of national banking associations under this Title.

(5174.) — The Comptroller of the Currency shall cause to be examined, each year, the plates, dies, [*but pieces*] [bed-pieces], and other material from which the national bank circulation is printed, in whole or in part, and file in his office annually a correct list of the same. Such material as shall have been used in the printing of the notes of associations which are in liquidation, or have closed business, shall be destroyed under such regulations as shall be prescribed by the Comptroller of the Currency and approved by the Secretary of the Treasury. The expenses of any such examination or destruction shall be paid out of any appropriation made by Congress for the special examination of national banks and bank note plates.<sup>2</sup>

(5214.) **Taxes. — Duties to United States.**<sup>3</sup> — In lieu of all existing taxes, every association shall pay to the Treasurer of the United States, in the months of January and July, a duty of one half of one per centum each half-year upon the average amount of its notes in circulation, and a duty of one quarter of one per centum each half-year upon the average amount of its deposits, and a duty of one quarter of one per centum each half-year on the average amount of its capital stock, beyond the amount invested in United States bonds.

(5215.) **Tax Return to Treasurer.** — In order to enable the Treasurer to assess the duties imposed by the preceding section, each association shall, within ten days from the first days of January and July of each year, make a return, under the oath of its president or cashier, to the Treasurer of the United States, in such forms as the Treasurer may prescribe, of the average amount of its notes in circulation, and of the average amount of its deposits, and of the average amount of its capital stock, beyond the amount invested in United States bonds, for the six months next preceding the most recent first day of January or

<sup>2</sup> See Fed. Res. Act, Secs. 16, 27, §§ 164, 195.

<sup>3</sup> See §§ 77, 80. Fed. Res. Act, Secs. 7, 27, §§ 119, 195, § 84 A, Sec. 9. *Tappan v. Merchants' National Bank*, 19 Wall. 490, 22 L. ed. 189; *Merchants' National Bank v. United States*, 214 U. S. 33, 53 L. ed. 900, 29 Sup. Ct. 593 (1909).

July. Every association which fails so to make such return shall be liable to a penalty of two hundred dollars, to be collected either out of the interest as it may become due such association on the bonds deposited with the Treasurer, or, at his option, in the manner in which penalties are to be collected of other corporations under the laws of the United States.

(5216.) **Penalty for Failure to make Return.** — Whenever any association fails to make the half-yearly return required by the preceding section, the duties to be paid by such association shall be assessed upon the amount of notes delivered to such association by the Comptroller of the Currency, and upon the highest amount of its deposits and capital stock, to be ascertained in such manner as the Treasurer may deem best.

(5217.) **Penalty for Failure to pay Duties.** — Whenever an association fails to pay the duties imposed by the three preceding sections, the sums due may be collected in the manner provided for the collection of United States taxes from other corporations; or the Treasurer may reserve the amount out of the interest, as it may become due, on the bonds deposited with him by such defaulting association.

(5218.) **Refunding excessive Duties.** — In all cases where an association has paid or may pay in excess of what may be or has been found due from it, on account of the duty required to be paid to the Treasurer of the United States, the association may state an account therefor, which, on being certified by the Treasurer of the United States, and found correct by the First Comptroller of the Treasury, shall be refunded in the ordinary manner by warrant on the Treasury.

(5219.) **State Taxation.**<sup>4</sup> — Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares,

<sup>4</sup> See § 241. *Bank of Commerce v. New York City*, 2 Bl. 620; *Van Allen v. The Assessors*, 3 Wall. 573, 18 L. ed. 229; *People v. The Commissioners*, 4 Wall. 244, 18 L. ed. 344; *Bradley v. The People*, 4 Wall. 459, 18 L. ed. 433; *National Bank v. The Commonwealth*, 9 Wall. 353, 19 L. ed. 701; *Lionberger v. Rouse*, 9 Wall. 468, 19 L. ed. 721; *Hepburn v. The School Directors*, 23 Wall. 480, 23 L. ed. 112; *People v. Commissioners of Taxes, etc.*, 94 U. S. 415, 24 L. ed. 164; *Bank of Omaha v. Douglas Co.*, 3 Dill. 299; *First National Bank v. Douglas Co.*, 3 Dill. 330; *State v. Clement National Bank*, 84 Vt. 167, 78 Atl. 944, 1912D Ann. Cas. 22, n., citing and reviewing many authorities and holding that a state may tax the interest bearing deposits in a national bank and that the bank may agree with the state to pay such taxes.



in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed.

(3413.) **Tax on Municipal Notes.** — Every national banking association, State bank, or banker, or association, shall pay a tax of ten per centum on the amount of any town, city, or municipal corporation, paid out by them.

(3417.) **Exemption of National Banks.** — The provisions of this chapter, relating to the tax on the deposits, capital, and circulation of banks, and to their returns, except as contained in sections thirty-four hundred and ten, thirty-four hundred and eleven, thirty-four hundred and twelve, [thirty-four hundred and thirteen], and thirty-four hundred and sixteen, and such parts of sections thirty-four hundred and fourteen and thirty-four hundred and fifteen as relate to the tax of ten per centum on certain notes, shall not apply to associations which are taxed under and by virtue of Title "National Banks."

### §§ 42, 43. Voluntary Dissolution

(a) (5220.) **Two thirds Vote.**<sup>1</sup> — Any association may go into liquidation and be closed<sup>2</sup> by the vote of its shareholders owning two thirds of its stock.

(b) (5221.) **Notice of Intent to Dissolve.** — Whenever a vote is taken to go into liquidation it shall be the duty of the board of directors to cause notice of this fact to be certified, under the seal of the association, by its president or cashier, to the Comptroller

<sup>1</sup> §§ 42, 43. See §§ 242, 243. 30 June, 1876, see § 84 *g*. *In re Manufacturers' National Bank*, 5 Biss. 499.

<sup>2</sup> After the association is closed it may transact only such business as is necessary or proper in the settlement or winding up of its affairs, but it may not transfer stock from one to another upon its books. *Muir v. Citizens' National Bank*, 39 Wash. 57, 80 Pac. 1007 (1903).

of the Currency, and publication thereof to be made for a period of two months in a newspaper published in the city of New York, and also in a newspaper published in the city or town in which the association is located, or if no newspaper is there published, then in the newspaper published nearest thereto, that the association is closing up its affairs, and notifying the holders of its notes and other creditors to present the notes and other claims against the association for payment.

(c) (5222.) **Deposit to Redeem Circulation.**<sup>3</sup> — Within six months from the date of the vote to go into liquidation, the association shall deposit with the Treasurer of the United States lawful money of the United States sufficient to redeem all its outstanding circulation. The Treasurer shall execute duplicate receipts for money thus deposited, and deliver one to the association and the other to the Comptroller of the Currency, stating the amount received by him, and the purpose for which it has been received; and the money shall be paid into the Treasury of the United States, and placed to the credit of such association upon redemption account.

(d) (5223.) **Except a Bank wishing to Consolidate with another.** — An association which is in good faith winding up its business for the purpose of consolidating with another association shall not be required to deposit lawful money for its outstanding circulation; but its assets and liabilities shall be reported by the association with which it is in process of consolidation.

(e) (5224.) **Re-assignment of Bonds and Redemption of Notes.**<sup>4</sup> — Whenever a sufficient deposit of lawful money to redeem the outstanding circulation of an association proposing to close its business has been made, the bonds deposited by the association to secure payment of its notes shall be re-assigned to it, in the manner prescribed by section fifty-one hundred and sixty-two. And thereafter the association and its shareholders shall stand discharged from all liabilities upon the circulating notes, and those notes shall be redeemed at the Treasury of the United States. [And if any such bank shall fail to make the deposit and take up its bonds for thirty days after the expiration of the time specified, the Comptroller of the Currency shall have power to sell the bonds pledged for the circulation of said bank, at public auction in New York City, and, after providing for the redemption and cancellation

<sup>3</sup> 20 June, 1874. See § 84 *a*.

<sup>4</sup> 18 February, 1875. See § 84 *e*, 84 A, Sec. 4.

of said circulation and the necessary expenses of the sale, to pay over any balance remaining to the bank or its legal representative.]

(f) (5225.) **Destruction of Notes.** — Whenever the Treasurer has redeemed any of the notes of an association which has commenced to close its affairs under the [six] [five] preceding sections, he shall cause the notes to be mutilated and charged to the redemption account of the association; and all notes so redeemed by the Treasurer shall, every three months, be certified to and burned in the manner prescribed in section fifty-one hundred and eighty-four.

§ 44. (5154.) **Change of State Bank to a National Bank.**<sup>1</sup> — Any bank incorporated by special law, or any banking institution organized under a general law of any State, may become a national association under this Title by the name prescribed in its organization certificate; and in such case the articles of association and the organization certificate may be executed by a majority of the directors of the bank or banking institution; and the certificate shall declare that the owners of two thirds of the capital stock have authorized the directors to make such certificate, and to change and convert the bank or banking institution into a national association. A majority of the directors, after executing the articles of association and organization certificate, shall have power to execute all other papers, and to do whatever may be required to make its organization perfect and complete as a national association. The shares of any such bank may continue to be for the same amount each as they were before the conversion, and the directors may continue to be the directors of the association until others are elected or appointed in accordance with the provisions of this chapter; and any State bank which is a stockholder in any other bank, by authority of State laws, may continue to hold its stock, although either bank, or both, may be organized under and have accepted the provisions of this Title. When the Comptroller of the Currency has given to such association a certificate, under his hand and official seal, that the provisions of this title have been complied with, and that it is authorized to commence the business of banking, the association shall have the same powers and privileges, and shall be subject to the same duties, responsibilities, and rules, in all respects, as are prescribed for other associations originally organized as national banking associations, and shall be held and regarded as such an association. But no such associa-

<sup>1</sup> § 44. See § 244 and § 65. Fed. Res. Act, Sec. 8, § 120.

tion shall have a less capital than the amount prescribed for associations organized under this Title.

(5155.) — It shall be lawful for any bank or banking association organized under State laws, and having branches, the capital being joint and assigned to and used by the mother bank and branches in definite proportions, to become a national banking association in conformity with existing laws, and to retain and keep in operation its branches, or such one or more of them as it may elect to retain; the amount of the circulation redeemable at the mother bank, and each branch to be regulated by the amount of capital assigned to and used by each.

(3416.) — Whenever any State bank or banking association has been converted into a national banking association, and such national banking association has assumed the liabilities of such State bank or banking association, including the redemption of its bills, by any agreement or understanding whatever with the representatives of such State bank or banking association, such national banking association shall be held to make the required return payment on the circulation outstanding, so long as such circulation shall exceed five per centum of the capital before such conversion of such State bank or banking association.

§ 45. (5153.) **Depositaries of Public Moneys.** — **Banks designated as such.**<sup>1</sup> — All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, except receipts from customs, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public moneys and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency

<sup>1</sup> § 45. See §§ 245, 84 A (14, 15); Branch's Case, 12 Ct. of Claims, 281; R. S. §§ 3639-3649, 5489; Fed. Res. Act, §§ 155, 195; Act Mar. 4, 1907, c. 2913, Sec. 3.

bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks.

§ 46. (5226.) **Failure to Redeem, and Protest of Notes.**<sup>1</sup> — Whenever any national banking association fails to redeem in the lawful money of the United States any of its circulating notes, upon demand of payment duly made during the usual hours of business, at the office of such association, or at its designated place of redemption, the holder may cause the same to be protested, in one package, by a notary public, unless the president or a cashier of the association whose notes are presented for payment, or the president or cashier of the association at the place at which they are redeemable offers to waive demand and notice of the protest, and, in pursuance of such offer, makes, signs, and delivers to the party making such demand an admission in writing, stating the time of the demand, the amount demanded, and the fact of the nonpayment thereof. The notary public, on making such protest, or upon receiving such admission, shall forthwith forward such admission or notice of protest to the Comptroller of the Currency, retaining a copy thereof. If, however, satisfactory proof is produced to the notary public that the payment of the notes demanded is restrained by order of any court of competent jurisdiction, he shall not protest the same. When the holder of any notes causes more than one note or package to be protested on the same day, he shall not receive pay for more than one protest.

(5228.) **Continuing Business after Default.**<sup>2</sup> — After a default on the part of an association to pay any of its circulating notes has been ascertained by the Comptroller, and notice [*of forfeiture of the bonds*] [thereof] has been given by him to the association, it shall not be lawful for the association suffering the same to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to it, and to deliver special deposits.

§ 47. (a) (5227.) **Examination by Special Agent.** — On receiving notice that any national banking association has failed to redeem any of its circulating notes, as specified in the preceding section, the Comptroller of the Currency, with the concurrence of the Secretary of the Treasury, may appoint a special agent, of whose appointment immediate notice shall be given to such

<sup>1</sup> § 46. See §§ 246–252, 84 A, Sec. 4.

<sup>2</sup> 18 February, 1875. See § 84 e, and §§ 246–252.

association, who shall immediately proceed to ascertain whether it has refused to pay its circulating notes in the lawful money of the United States, when demanded, and shall report to the Comptroller the fact so ascertained. If, from such protest, and the report so made, the Comptroller is satisfied that such association has refused to pay its circulating notes, and is in default, he shall, within thirty days after he has received notice of such failure, declare the bonds deposited by such association forfeited to the United States, and they shall thereupon be so forfeited.

(b) (5229.) **Notice to Holders.** — Immediately upon declaring the bonds of an association forfeited for nonpayment of its notes, the Comptroller shall give notice, in such manner as the Secretary of the Treasury shall, by general rules or otherwise, direct, to the holders of the circulating notes of such association, to present them for payment at the Treasury of the United States; and the same shall be paid as presented in lawful money of the United States; whereupon the Comptroller may, in his discretion, cancel an amount of bonds pledged by such association equal at current market rates, not exceeding par, to the notes paid.

(c) (5232.) **Redemption at Treasury.** — The Secretary of the Treasury may, from time to time, make such regulations respecting the disposition to be made of circulating notes after presentation at the Treasury of the United States for payment, and respecting the perpetuation of the evidence of the payment thereof, as may seem to him proper.

(d) (5233.) **Bonds and Notes Cancelled.**<sup>1</sup> — All notes of national banking associations presented at the Treasury of the United States for payment shall, on being paid, be cancelled.

§ 48. (5230.) **Auction Sale of Bonds.** — Whenever the Comptroller has become satisfied, by the protest or the waiver and admission specified in section fifty-two hundred and twenty-six, or by the report provided for in section fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes, he may, instead of cancelling its bonds, cause so much of them as may be necessary to redeem its outstanding notes to be sold at public auction in the city of New York, after giving thirty days' notice of such sale to the association. For any deficiency in the proceeds of all the bonds of an association, when thus sold, to reimburse to the United States the amount expended in paying the circulating notes of the association, the United States shall

<sup>1</sup> § 47. See §§ 246-252.

have a paramount lien upon all its assets; and such deficiency shall be made good out of such assets in preference to any and all other claims whatsoever, except the necessary costs and expenses of administering the same.

§ 49. (5231.) **Sale of Bonds at Private Sale.**—The Comptroller may, if he deems it for the interest of the United States, sell at private sale any of the bonds of an association shown to have made default in paying its notes, and receive therefor either money or the circulating notes of the association. But no such bonds shall be sold by private sale for less than par, nor for less than the market value thereof at the time of sale; and no sales of any such bonds, either public or private, shall be complete until the transfer of the bonds shall have been made with the formalities prescribed by sections fifty-one hundred and sixty-two, fifty-one hundred and sixty-three, and fifty-one hundred and sixty-four.

§ 50. (a) (5234.) **Appointment of Receiver.**<sup>1</sup>—On becoming satisfied, as specified in sections fifty-two hundred and twenty-six and fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets<sup>2</sup> of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct;<sup>3</sup> and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasury of the United

<sup>1</sup> § 50. 30 June, 1876, § 84 *g*. Suits by, § 250. *Kennedy v. Gibson*, 8 Wall. 498, 19 L. ed. 476; *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383, 20 L. ed. 840; *Bank v. Kennedy*, 17 Wall. 19, 21 L. ed. 544; *In re Platt, Receiver, etc.*, 1 Ben. 534; *Chemical National Bank v. Bailey*, 12 Blatchf. 480; *Cadel v. Baker*, 20 Wall. 650, 22 L. ed. 448.

<sup>2</sup> Such receiver may stop *in transitu* money which the association has sent by an express company to pay its debts to its correspondents. *Dexter Horton National Bank v. Hawkins*, 193 Fed. 363 (1912).

<sup>3</sup> When a stipulation says that a claim was "sold and transferred . . . to A. who is now the owner and holder thereof" it imports that the transfer was a legal one and that all necessary steps were taken to make the transfer valid. *Waldron v. Alling*, 73 App. Div. 86 (1902), 76 N. Y. S. 250.

States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings.

(b) (5235.) **Notice to Present Claims.** — The Comptroller shall, upon appointing a receiver, cause notice to be given, by advertisement in such newspapers as he may direct, for three consecutive months, calling on all persons who may have claims against such association to present the same, and to make legal proof thereof.

(c) (5236.) **Dividends.**<sup>4</sup> — From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.

(d) (5237.) **Injunction on Receiver.** — Whenever an association against which proceedings have been instituted, on account of any alleged refusal to redeem its circulating notes as aforesaid, denies having failed to do so, it may, at any time within ten days after it has been notified of the appointment of an agent, as provided in section fifty-two hundred and twenty-seven, apply to the nearest Circuit, or District, or Territorial court of the United States to enjoin further proceedings in the premises; and such court, after citing the Comptroller of the Currency to show cause why further proceedings should not be enjoined, and after the decision of the court or finding of a jury that such association has not refused to redeem its circulating notes, when legally presented, in the lawful money of the United States, shall make an order enjoining the Comptroller, and any receiver acting under his direction, from all further proceedings on account of such alleged refusal.

§ 51. (5238.) **Fees and Expenses.** — All fees for protesting the notes issued by any national banking association shall be paid by the person procuring the protest to be made, and such association shall be liable therefor; but no part of the bonds de-

<sup>4</sup> See § 250 c. 30 June, 1876. See § 84 g.



posited by such association shall be applied to the payment of such fees. All expenses of any preliminary or other examinations into the condition of any association shall be paid by such association. All expenses of any receivership shall be paid out of the assets of such association before distribution of the proceeds thereof.

§ 52. (5242.) **Void Transfers. — Insolvency.**<sup>1</sup> — All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment,<sup>2</sup> injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.<sup>3</sup>

<sup>1</sup> § 52. See § 252. *National Bank v. Colby*, 21 Wall. 609, 22 L. ed. 687; *Case v. Citizens' Bank*, 2 Woods 23; *Casey v. Credit Mobilier*, 2 Woods 77; *Irons v. Manufacturers' National Bank*, 6 Biss. 301.

<sup>2</sup> When a consignee resorts to an attachment in chancery to subject the proceeds of a draft in a resident state bank to damages arising from a breach of warranty in a sale of grain by a non-resident consignor who has sold a draft to a non-resident bank for the price of the grain, there is no attachment within the meaning of this section. *Searles v. Smith Grain Co.*, 80 Miss. 688, 32 So. 287 (1902).

Nor is there a violation of the statute when the appointment of a receiver is a part of the final judgment. *Cogswell v. Second National Bank*, 76 Conn. 252, 56 Atl. 574 (1903).

<sup>3</sup> *Meyer v. First National Bank*, 10 Idaho 175, 77 Pac. 334 (1904); *Willard Mfg. Co. v. Merchants' National Bank*, 130 N. C. 609, 41 S. E. 870 (1902); *Van Reed v. People's National Bank*, 67 App. Div. 75 (1901), 73 N. Y. S. 314, affirmed in 173 N. Y. 314, 66 N. E. 16, 105 Am. St. Rep. 666 (1903), and in 198 U. S. 554, 49 L. ed. 1161, 25 Sup. Ct. 775 (1905); *McBride v. Illinois National Bank*, 128 App. Div. 503 (1908), 112 N. Y. S. 794.

The statute applies to national banks generally whether solvent or insolvent. *Van Reed v. People's National Bank*, *supra*; and it was not overruled by the act of July 12, 1882; *Van Reed v. People's National Bank*, *supra*; and the prohibition extends to all attachments issued under authority of state courts. *Van Reed v. People's National Bank*, *supra*, and also restricts the action of the federal courts. *Willard Mfg. Co. v. Merchants' National Bank*, *supra*.

§ 53. (5239.) **Penalty for Violating the National Banking Laws.**<sup>1</sup>— If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this Title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper Circuit, District, or Territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.

§ 54. (5240.) **Examiners, Appointment of Occasional.**<sup>1</sup>— The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall, as often as shall be deemed necessary or proper, appoint a suitable person or persons to make an examination of the affairs of every banking association, who shall have power to make a thorough examination into all the affairs of the association, and, in doing so, to examine any of the officers and agents thereof on oath; and shall make a full and detailed report of the condition of the association to the Comptroller. [*Every person appointed to make such examination shall receive for his services at the rate of five dollars for each day by him employed in such examination, and two dollars for every twenty-five miles he shall necessarily travel in the performance of his duty, which shall be paid by the association by him examined. But no person shall be appointed to examine the affairs of any banking association of which he is a director or other officer.*] [That all persons appointed to be examiners of national banks not located in the redemption cities specified in section five thousand one hundred and ninety-two of the Revised Statutes of the United States, or in any one of the States of Oregon, California, and Nevada, or in the Territories, shall receive compensation for such examination as follows: For examining national banks having a capital less than one hundred thousand dollars, twenty dollars; those having a capital of one

<sup>1</sup> § 53. See § 153. 30 June, 1876. See § 84 g; Fed. Res. Act, Sec. II (d), 21, §§ 143, 185.

<sup>1</sup> § 54. 19 February, 1875. See § 84 f; Fed. Res. Act, Sec. 21, § 185.

hundred thousand dollars and less than three hundred thousand dollars, twenty-five dollars; those having a capital of three hundred thousand dollars and less than four hundred thousand dollars, thirty-five dollars; those having a capital of four hundred thousand dollars and less than five hundred thousand dollars, forty dollars; those having a capital of five hundred thousand dollars and less than six hundred thousand dollars, fifty dollars; those having a capital of six hundred thousand dollars and over, seventy-five dollars; which amounts shall be assessed by the Comptroller of the Currency upon, and paid by, the respective associations so examined; and shall be in lieu of the compensation and mileage heretofore allowed for making said examinations, and persons appointed to make examination of national banks in the cities named in section five thousand one hundred and ninety-two of the Revised Statutes of the United States, or in any one of the States of Oregon, California, and Nevada, or in the Territories, shall receive such compensation as may be fixed by the Secretary of the Treasury upon the recommendation of the Comptroller of the Currency; and the same shall be assessed and paid in the manner hereinbefore provided.]

(5241.) **Visitorial Powers over National Banks limited.**<sup>2</sup> — No association shall be subject to any visitorial powers other than such as are authorized by this Title, or are vested in the courts of justice.<sup>3</sup>

(5243.) “ **National** ” **Use of the Title.** — All banks not organized and transacting business under the national currency laws, or under this Title, and all persons or corporations doing the business of bankers, brokers, or savings institutions, except savings banks authorized by Congress to use the word “ national ” as a part of their corporate name, are prohibited from using the word “ national ” as a portion of the name or title of such bank, corporation, firm, or partnership; and any violation of this prohibition committed after the third day of September, eighteen hundred and

<sup>2</sup> See Fed. Res. Act, Sec. 21, § 187.

<sup>3</sup> Statutes providing for escheat of unclaimed deposits in national banks are not an exercise of visitorial powers provided by Sec. 5241. *State v. First National Bank*, 61 Or. 551, 123 Pac. 712, 1914B Ann. Cas. 153, n.; nor is an application by a *bona fide* stockholder of a national bank, to examine its books, accounts and loans in order to determine the value of its stock an exercise of the visitorial powers within the meaning of Sec. 5241. *Harkness v. Guthrie*, 27 Utah 248, 75 Pac. 624, 107 Am. St. Rep. 576, n. (1904); *Guthrie v. Harkness*, 199 U. S. 148, 50 L. ed. 130, 26 Sup. Ct. 4 (1905).

seventy-three, shall subject the party chargeable therewith to a penalty of fifty dollars for each day during which it is committed or repeated.

§ 55. (5209.) **Embezzlement.** — **Penalty.**<sup>1</sup> — Every president, director, cashier, teller, clerk, or agent of any association, who embezzles,<sup>2</sup> abstracts,<sup>2</sup> or wilfully misapplies<sup>3</sup> any of the moneys,<sup>4</sup> funds,<sup>4</sup> or credits<sup>4</sup> of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry<sup>5</sup> in any book, report, or statement of the association, with intent, in either case, to injure or defraud<sup>6</sup> the association or any other company, body politic or corporate, or any individual person, or to deceive<sup>7</sup> any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.

(5208.) **False Certification.** — **Penalty.**<sup>8</sup> — It shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check. Any check so certified by duly authorized officers shall be a good and valid obligation against

<sup>1</sup> § 55. See § 259. *United States v. Taintor*, 11 Blatchf. 374. Fed. Res. Act, Sec. 9, §§ 124, 125.

<sup>2</sup> See *United States v. Breese*, 131 Fed. 915 (1904).

<sup>3</sup> "Wilful misapplication" has no settled technical meaning. *United States v. Heinze*, 161 Fed. 425 (1908). See *Griger v. United States*, 162 Fed. 844 (1908). A cashier who overdraws his account by check which is not charged to his account but which is kept in a drawer and later taken up by a note may be convicted of wilful misapplication. *Brock v. United States*, 149 Fed. 173 (1906).

<sup>4</sup> For the meaning of the terms see *United States v. Smith*, 152 Fed. 542 (1907).

<sup>5</sup> See *United States v. Morse*, 161 Fed. 429 (1908).

<sup>6</sup> An intent to defraud is not inconsistent with an interest in the prosperity of the Bank. *United States v. Breese*, 131 Fed. 915 (1904).

<sup>7</sup> See *Clement v. United States*, 149 Fed. 305 (1906).

<sup>8</sup> § 259. See § 79. See Fed. Res. Act, Sec. 9, §§ 124, 125.

the association; but the act of any officer, clerk, or agent of any association, in violation of this section, shall subject such bank to the liabilities and proceedings on the part of the Comptroller as provided for in section fifty-two hundred and thirty-four.<sup>9</sup>

§ 56. (380.) **Suits arising under National Banking Laws to be conducted by District Attorneys.**<sup>1</sup>—All suits and proceedings arising out of the provisions of law governing national banking associations, in which the United States or any of its officers or agents shall be parties, shall be conducted by the district attorneys of the several districts under the direction and supervision of the Solicitor of the Treasury.

### § 57. Jurisdiction<sup>1</sup>

(563.) **District Courts.**<sup>2</sup>—The District Courts shall have jurisdiction as follows:—

Fifteenth. Of all suits by or against any association established under any law providing for national banking associations within the district for which the court is held.

(629.) **Circuit Courts.**<sup>3</sup>—The Circuit Courts shall have original jurisdiction as follows:—

Tenth. Of all suits by or against any banking association established in the district for which the court is held, under any law provided for national banking associations.

Eleventh. Of all suits brought by [*or against*] any banking association established in the district for which the court is held, under the provisions of Title “The National Banks”, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. See R. S. § 5237.

(640.) **Removal from State Courts.**<sup>4</sup>—Any suit commenced

<sup>9</sup> Section 5208 does not of itself create any criminal offence. This section and section 13 of the Act of 1882 create but a single offence. *United States v. Heinze*, 161 Fed. 425 (1908).

<sup>1</sup> § 56. § 256. *Kennedy v. Gibson*, 8 Wall. 498, 19 L. ed. 476.

<sup>2</sup> § 57. See §§ 70, 82.

<sup>3</sup> § 257. *Kennedy v. Gibson*, 8 Wall. 506, 19 L. ed. 479; *Cadle v. Tracy*, 11 Blatchf. 101.

<sup>4</sup> § 257. See § 50 *d.* *Kennedy v. Gibson*, 8 Wall. 506, 19 L. ed. 476.

A circuit court may take and retain jurisdiction of a suit in equity commenced by the receiver of an insolvent bank, at the direction of the Comptroller of the Currency to enforce a liability due the bank, and to dispose of a considerable part of its assets. *McCartney v. Earle*, 115 Fed. 462 (1902).

<sup>4</sup> Attachments, § 257 *a.* Removal, § 257 *b.*

in any court other than a Circuit or District Court of the United States against any corporation other than a banking corporation, organized under a law of the United States, or against any member thereof as such member for any alleged liability of such corporation, or of such member as a member thereof, may be removed, for trial, in the Circuit Court for the district where such suit is pending, upon the petition of such defendant, verified by oath, stating that such defendant has a defence arising under or by virtue of the Constitution or of any treaty or law of the United States. Such removal, in all other respects, shall be governed by the provisions of the preceding section.

(736.) **Enjoining Comptroller.** — All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, shall be had in the district where such association is located.

§ 58. (5189.) See § 27.

§ 59. (5415.) **Counterfeiting National Bank Notes.**<sup>1</sup> — Every person who falsely makes, forges, or counterfeits, or causes or procures to be made, forged, or counterfeited, or willingly aids or assists in falsely making, forging, or counterfeiting, any note in imitation of, or purporting to be in imitation of, the circulating notes issued by any banking association now or hereafter authorized and acting under the laws of the United States; or who passes, utters, or publishes, or attempts to pass, utter, or publish, any false, forged, or counterfeited note, purporting to be issued by any such association doing a banking business, knowing the same to be falsely made, forged, or counterfeited, or who falsely alters, or causes or procures to be falsely altered, or willingly aids or assists in falsely altering any such circulating notes, or passes, utters, or publishes, or attempts to pass, utter, or publish as true, any falsely altered or spurious circulating note issued, or purporting to have been issued, by any such banking association, knowing the same to be falsely altered or spurious, shall be imprisoned at hard labor not less than five years, nor more than fifteen years, and fined not more than one thousand dollars.

§ 60. This section of the act of June 3, 1864, was not incorporated into the Revised Statutes. It concerns forgery of bank notes.

§ 61. (333.) See § 3 c.

<sup>1</sup> § 59. See § 259.

§ 62. (5166.) **Banks Organized under Law of 1863 have their Rights Reserved.** — Nothing in this Title shall affect any appointments made, acts done, or proceedings had or commenced prior to the third day of June, eighteen hundred and sixty-four, in or toward the organization of any national banking association under the act of February twenty-five, eighteen hundred and sixty-three ; but all associations which, on the third day of June, eighteen hundred and sixty-four, were organized or commenced to be organized under that act, shall enjoy all the rights and privileges granted, and be subject to all the duties, liabilities, and restrictions imposed by this Title, notwithstanding all the steps prescribed by this Title for the organization of associations were not pursued, if such associations were duly organized under that act.

(5157.) **To what Associations the above Provisions apply.** — The provisions of §§ 5157 to 5243 inclusive, which are expressed without restrictive words, as applying to “national banking associations”, or to “associations”, apply to all associations organized to carry on the business of banking under any act of Congress.

§ 63. (5152.) **Executors, Trustees, etc., Liability.** — Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders ; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name.

#### SUBSEQUENT LAWS

#### § 64. **An Act to Forbid the further Retirement of United States Legal Tender Notes** <sup>1</sup>

*Be it enacted, etc.,* That from and after the passage of this act it shall not be lawful for the Secretary of the Treasury or other officer under him, to cancel or retire any more of the United States legal tender notes, and when any of said notes may be redeemed or be received into the Treasury under any law, from any source whatever, and shall belong to the United States, they shall not be retired, cancelled, or destroyed, but they shall be reissued and paid out again and kept in circulation, provided that nothing herein shall prohibit the cancellation and destruction of mutilated notes

<sup>1</sup> § 64. 31 May, 1878.

and the issue of other notes of like denomination in their stead, as now provided by law. All acts or parts of acts in conflict herewith are hereby repealed.

**§ 65. An Act authorizing the Conversion of National Gold Banks<sup>1</sup>**

National gold banks may become currency banks. Date of organization certificates.

*Be it enacted, etc.,* That any national gold bank organized under the provisions of the laws of the United States may, in the manner and subject to the provisions prescribed by section fifty-one hundred and fifty-four of the Revised Statutes of the United States, for the conversion of banks incorporated under the laws of any State, cease to be a gold bank, and become such an association as is authorized by section fifty-one hundred and thirty-three, for carrying on the business of banking, and shall have the same powers and privileges, and shall be subject to the same duties, responsibilities, and rules, in all respects, as are by law prescribed for such associations.

*Provided,* That all certificates of organization which shall be issued under this act shall bear the date of the original organization of each bank respectively as a gold bank.

**§ 66. An Act defining the Verification of Returns of National Banks<sup>1</sup>**

Reports of national banks may be sworn to before a notary public, if not an officer of the bank.

*Be it enacted, etc.,* That the oath or affirmation required by section fifty-two hundred and eleven of the Revised Statutes, verifying the returns made by national banks to the Comptroller of the Currency, when taken before a notary public properly authorized and commissioned by the State in which such notary resides and the bank is located, or any other officer having an official seal, authorized in such State to administer oaths, shall be a sufficient verification as contemplated by said section fifty-two hundred and eleven.

*Provided,* That the officer administering the oath is not an officer of the bank.

<sup>1</sup> § 65. 14 February, 1880. See § 44.

<sup>1</sup> § 66. February 26, 1881. See § 34.



**An act to enable National Banking Associations to extend their Corporate Existence, and for other Purposes**<sup>1</sup>

§ 67. **Extension of Existence Twenty Years, unless.**— *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any national banking association organized under the acts of February twenty-fifth, eighteen hundred and sixty-three, June third, eighteen hundred and sixty-four, and February fourteenth, eighteen hundred and eighty, or under sections fifty-one hundred and thirty-three, fifty-one hundred and thirty-four, fifty-one hundred and thirty-five, fifty-one hundred and thirty-six, and fifty-one hundred and fifty-four of the Revised Statutes of the United States, may, at any time within the two years next previous to the date of the expiration of its corporate existence under present law, and with the approval of the Comptroller of the Currency,<sup>2</sup> to be granted, as hereinafter provided, extend its period of succession by amending its articles of association for a term of not more than twenty years from the expiration of the period of succession named in said articles of association, and shall have succession for such extended period, *unless* sooner dissolved by the act of shareholders owning two thirds of its stock, or unless its franchise becomes forfeited by some violation of law, or unless hereafter modified or repealed.

§ 68. **Such Amendment of Articles of Association requires Consent of two thirds of the Stockholders.**— SEC. 2. That such amendment of said articles of association shall be authorized by the consent in writing of shareholders owning not less than two thirds of the capital stock of the association; and the board of directors shall cause such consent to be certified under the seal of the association, by its president or cashier, to the Comptroller of the Currency, accompanied by an application made by the

<sup>1</sup> § 67. July 12, 1882. Chap. 290.

<sup>2</sup> A certificate by the Comptroller of the Currency that a bank has complied with all the provisions of the Act to enable it to extend its corporate existence and certifies that the bank is authorized to have succession is conclusive evidence of compliance by the bank of all necessary prerequisite conditions, and the bank will be presumed to have accepted the benefits and to have acted under the authority of the certificate. It is immaterial that the certificate is signed by the deputy and acting Comptroller, the seal of the Comptroller stamped upon the certificate being sufficient proof of its authenticity. *Clement v. United States*, 149 Fed. 305 (1906).

president or cashier for the approval of the amended articles of association by the Comptroller; and such amended articles of association shall not be valid until the Comptroller shall give to such association a certificate under his hand and seal that the association has complied with all the provisions required to be complied with, and is authorized to have succession for the extended period named in the amended articles of association.

§ 69. **Comptroller's Examination.** — SEC. 3. That upon the receipt of the application and certificate of the association provided for in the preceding section, the Comptroller of the Currency shall cause a special examination to be made, at the expense of the association, to determine its condition; and if after such examination or otherwise it appears to him that said association is in a satisfactory condition, he shall grant his certificate of approval, provided for in the preceding section, or if it appears that the condition of said association is not satisfactory, he shall withhold such certificate of approval.

§ 70. **Identity, Rights, and Liabilities preserved.** — **Jurisdiction of Suits.**<sup>1</sup> — SEC. 4. That any association so extending the period of its succession shall continue to enjoy all the rights and privileges and immunities granted, and shall continue to be subject to all the duties, liabilities, and restrictions imposed, by the Revised Statutes of the United States and other acts having reference to national banking associations, and it shall continue to be in all respects the identical association it was before the extension of its period of succession: *Provided, however,* That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking associations may be doing business when such suits may be begun:<sup>2</sup> and all laws and parts

<sup>1</sup> § 70. See § 57.

<sup>2</sup> The statute does not refer only to jurisdiction of federal courts, but applies as well to actions instituted in the courts of a state in which the defendant resides. Its provision is not superseded by the laws of August 13, 1888, section 4, and a bill of complaint may be filed in the county where the complainant resides against a national bank in another county. *Levitan v. Houghton National Bank*, 174 Mich. 566, 140 N. W. 1019 (1913). But see *George v. Wallace*, 135 Fed. 286 (1905), holding that this section was displaced by sec. 4 of the law of 1888 which was substituted therefor.

of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed.<sup>3</sup>

§ 71. **Shareholder dissenting may withdraw.** — SEC. 5. That when any national banking association has amended its articles of association as provided in this act, and the Comptroller has granted his certificate of approval, any shareholder not assenting to such amendment may give notice in writing to the directors, within thirty days from the date of the certificate of approval, of his desire to withdraw from said association,<sup>1</sup> in which case he shall be entitled to receive from said banking association the value of the shares so held by him, to be ascertained by an appraisal made by a committee of three persons, one to be selected by such shareholder, one by the directors, and the third by the first two; and in case the value so fixed shall not be satisfactory to any such shareholder, he may appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and if said reappraisal shall exceed the value fixed by said committee, the bank shall pay the expenses of said reappraisal, and otherwise the appellant shall pay said expenses; and the value so ascertained and determined shall be deemed to be a debt due, and be forthwith paid, to said shareholder from said bank; and the shares so surrendered and appraised shall, after due notice, be sold at public sale, within thirty days after the final appraisal provided in this section: *Provided*, That in the organization of any banking association intended to replace any existing banking association, and retaining the name thereof, the holders of stock in the expiring association

<sup>3</sup> This section is not inconsistent with section 5242 U. S. Rev. Sts. prohibiting attachments, injunctions, and executions against national banks. The act was intended to prescribe the forum for litigation and does not relate to provisional remedies or procedure. *Continental National Bank v. Buford*, 191 U. S. 119, 48 L. ed. 119, 24 Sup. Ct. 54 (1903); *Van Reed v. People's National Bank*, 67 App. Div. 75 (1901), 73 N. Y. S. 514, affirmed in 173 N. Y. 314, 66 N. E. 16, 105 Am. St. Rep. 666 (1903); 198 U. S. 554, 49 L. ed. 1161, 25 Sup. Ct. 775 (1905).

<sup>1</sup> § 71. Stockholders who have complied with all that is to be done by them cease to be members of the association even if, through no fault of theirs, final action by two thirds of the stockholders asking for a renewal of the charter has not been taken; and such withdrawing stockholders are not liable for assessments subsequently made by the Comptroller of the Currency under section 5151 U. S. Rev. Sts. *Apsey v. Kimball*, 221 U. S. 514, 55 L. ed. 834, 31 Sup. Ct. 695 (1911), affirming 164 Fed. 830 (1908). Whether or not one ceases to be a stockholder upon notice of a desire to withdraw and a refusal to assent to extension, undecided in *Apsey v. Whittemore*, 199 Mass. 65, 85 N. E. 91 (1908).

shall be entitled to preference in the allotment of the shares of the new association in proportion to the number of shares held by them respectively in the expiring association.<sup>2</sup>

§ 72. **Redemption of Circulation.**<sup>1</sup> — SEC. 6. That the circulating notes of any association so extending the period of its succession which shall have been issued to it prior to such extension shall be redeemed at the Treasury of the United States, as provided in section three of the act of June twentieth, eighteen hundred and seventy-four, entitled, "An Act fixing the amount of United States notes, providing for redistribution of national bank currency, and for other purposes," and such notes when redeemed shall be forwarded to the Comptroller of the Currency, and destroyed as now provided by law; and at the end of three years from the date of the extension of the corporate existence of each bank the association so extended shall deposit lawful money with the Treasurer of the United States sufficient to redeem the remainder of the circulation which was outstanding at the date of its extension, as provided in sections fifty-two hundred and twenty-two, fifty-two hundred and twenty-four, and fifty-two hundred and twenty-five of the Revised Statutes; and any gain that may arise from the failure to present such circulating notes for redemption shall inure to the benefit of the United States; and from time to time, as such notes are redeemed or lawful money deposited therefor as provided herein, new circulating notes shall be issued as provided by this act, bearing such devices, to be approved by the Secretary of the Treasury, as shall make them readily distinguishable from the circulating notes heretofore issued: *Provided, however,* That each banking association which shall obtain the benefit of this act shall reimburse to the Treasury the cost of preparing the plate or plates for such new circulating notes as shall be issued to it.

<sup>2</sup> When a shareholder in a national bank whose charter expired May 20, 1914, and which had obtained an extension, upon June 5th gave written notice of a desire to withdraw and the bank had in the meantime on June 1st, declared a dividend from its profits, the greater part of which had been earned prior to the expiration of its original charter, and the bank paid the dividend on July 2d, it was held that the shareholder's withdrawal was effective on the day the bank's original charter expired and that he was not entitled to the dividend. It was also held that the shareholder's demand of an acceptance of the dividend waived the withdrawal, and was irrevocable, at least until the bank had acted upon it. *Smith v. Phillips National Bank*, 114 Me. 297, 92 Atl. 217 (1915).

<sup>1</sup> § 72. R. S. 5222, 5224, 5225.

§ 73. **Closing of Banks not adopting these Provisions.**<sup>1</sup> — SEC. 7. That national banking associations whose corporate existence has expired or shall hereafter expire, and which do not avail themselves of the provisions of this act, shall be required to comply with the provisions of sections fifty-two hundred and twenty-one and fifty-two hundred and twenty-two of the Revised Statutes in the same manner as if the shareholders had voted to go into liquidation, as provided in section fifty-two hundred and twenty of the Revised Statutes; and the provisions of sections fifty-two hundred and twenty-four and fifty-two hundred and twenty-five of the Revised Statutes shall also be applicable to such associations, except as modified by this act; and the franchise of such association is hereby extended for the sole purpose of liquidating their affairs until such affairs are finally closed.<sup>2</sup>

§ 74. **Bonds not more than one fourth Capital. — Circulation not to exceed ninety per cent of Bonds. — Assessments for Redemption of Outstanding Notes.** — SEC. 8. That national banks now organized or hereafter organized, having a capital of one hundred and fifty thousand dollars, or less, shall not be required to keep on deposit or deposit with the Treasurer of the United States, United States bonds in excess of one fourth of their capital stock as security for their circulating notes; but such banks shall keep on deposit or deposit with the Treasurer of the United States, the amount of bonds as herein required. And such of those banks having on deposit bonds in excess of that amount are authorized to reduce their circulation by the deposit of lawful money as provided by law: *Provided*, That the amount of such circulating notes shall not in any case exceed ninety per centum of the par value of the bonds deposited as herein provided: *Provided further*, That the national banks which shall hereafter make deposits of lawful money for the retirement in full of their circulation shall at the time of their deposit be assessed, for the cost of transporting and redeeming their notes then outstanding, a sum equal to the average cost of the redemption of national bank notes during the preceding year, and shall thereupon pay such assessment. And all national banks which have heretofore made or shall hereafter make deposits of lawful money for the

<sup>1</sup> § 73. R. S. 5220-5225.

<sup>2</sup> National Banks retain the capacity of suing and being sued for the proper liquidation of their affairs. *Cogswell v. Second National Bank*, 76 Conn. 252, 56 Atl. 574 (1903).

reduction of their circulation shall be assessed and shall pay an assessment in the manner specified in section three of the act approved June twentieth, eighteen hundred and seventy-four, for the cost of transporting and redeeming their notes redeemed from such deposits subsequently to June thirtieth, eighteen hundred and eighty-one.

§ 75. **Withdrawal or Increase of Circulation.**<sup>1</sup> — SEC. 9. That any national banking association now organized, or hereafter organized, desiring to withdraw its circulating notes, upon a deposit of lawful money with the Treasurer of the United States, as provided in section four of the act of June twentieth, eighteen hundred and seventy-four, entitled, "An Act fixing the amount of United States notes, providing for a redistribution of national bank currency, and for other purposes," or as provided in this act, is authorized to deposit lawful money and withdraw a proportionate amount of the bonds held as security for its circulating notes in the order of such deposits; and no national bank which makes any deposit of lawful money in order to withdraw its circulating notes shall be entitled to receive any increase of its circulation for the period of six months from the time it made such deposit of lawful money for the purpose aforesaid: *Provided*, That not more than three millions of dollars of lawful money shall be deposited during any calendar month for this purpose: *and provided further*, That the provisions of this section shall not apply to bonds called for redemption by the Secretary of the Treasury, nor to the withdrawal of circulating notes in consequence thereof.

§ 76. **Deposit of Bonds and Notes issued not to exceed ninety per cent of paid Capital.**<sup>1</sup> — SEC. 10. That upon a deposit of bonds as described by sections fifty-one hundred and fifty-nine and fifty-one hundred and sixty, except as modified by section four of an act entitled "An Act fixing the amount of United States notes, providing for a redistribution of the national bank currency, and for other purposes," approved June twentieth, eighteen hundred and seventy-four, and as modified by section eight of this act, the association making the same shall be entitled to receive from the Comptroller of the Currency circulating notes of different denominations, in blank, registered and countersigned as provided by law, equal in amount to ninety per centum of the current market value, not exceeding par, of the United

<sup>1</sup> § 75. § 84 A. <sup>1</sup> § 76. R. S. 5159, 5160. R. S. 5171, 5176, repealed.

States bonds so transferred and delivered, and at no time shall the total amount of such notes issued to any such association exceed ninety per centum of the amount at such time actually paid in of its capital stock; and the provisions of sections fifty-one hundred and seventy-one and fifty-one hundred and seventy-six of the Revised Statutes are hereby repealed.

§ 77. **Three and one half per cent Bonds exchanged for Three per cent Registered. — Tax Exemption. —** SEC. 11. That the Secretary of the Treasury is hereby authorized to receive at the Treasury any bonds of the United States bearing three and a half per centum interest, and to issue in exchange therefor an equal amount of registered bonds of the United States of the denominations of fifty, one hundred, five hundred, one thousand, and ten thousand dollars, of such form as he may prescribe, bearing interest at the rate of three per centum per annum, payable quarterly at the Treasury of the United States. Such bonds shall be exempt from all taxation by or under State authority, and be payable at the pleasure of the United States: *Provided*, That the bonds herein authorized shall not be called in and paid so long as any bonds of the United States heretofore issued bearing a higher rate of interest than three per centum, and which shall be redeemable at the pleasure of the United States, shall be outstanding and uncalled. The last of the said bonds originally issued under this act, and their substitutes, shall be first called in, and this order of payment shall be followed until all shall have been paid.

§ 78. **Gold Certificates issued in Exchange for Coin until — Such Certificates and Silver Certificates counted in the Reserve. — No Bank to be a Member of a Clearing-House refusing Gold or Silver Certificates.**<sup>1</sup> — SEC. 12. That the Secretary of the Treasury is authorized and directed to receive deposits of gold coin with the Treasurer or assistant treasurers of the United States, in sums not less than twenty dollars, and to issue certificates therefor in denominations of not less than twenty dollars each, corresponding with the denominations of United States notes. The coin deposited for or representing the certificates of deposit shall be retained in the Treasury for the payment of the same on demand. Said certificates shall be receivable for customs, taxes, and all public dues, and when so received may be reissued; and such certificates, as also silver certificates, when

<sup>1</sup> § 78. R. S. 5207.

held by any national banking association, shall be counted as part of its lawful reserve; and no national banking association shall be a member of any clearing-house in which such certificates shall not be receivable in the settlement of clearing house balances: *Provided*, That the Secretary of the Treasury shall suspend the issue of such gold certificates whenever the amount of gold coin and gold bullion in the Treasury reserved for the redemption of United States notes falls below one hundred millions of dollars; and the provisions of section fifty-two hundred and seven of the Revised Statutes shall be applicable to the certificates herein authorized and directed to be issued.

§ 79. **Penalty for False Certification.**<sup>1</sup> — SEC. 13. That any officer, clerk, or agent of any national banking association who shall wilfully violate the provisions of an act entitled "An Act in reference to certifying checks by national banks", approved March third, eighteen hundred and sixty-nine, being section fifty-two hundred and eight of the Revised Statutes of the United States, or who shall resort to any device, or receive any fictitious obligation, direct or collateral, in order to evade the provisions thereof, or who shall certify<sup>2</sup> checks before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof in any Circuit or District Court of the United States, be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, in the discretion of the court.<sup>3</sup>

SEC. 14. That Congress may at any time amend, alter, or repeal this act and the acts of which this is amendatory.

§ 80. **An Act to reduce Internal Revenue Taxation, and for other Purposes.**<sup>1</sup>

**Taxes repealed.** — *Be it enacted by the Senate and House of Representatives of the United States of America in Congress as-*

<sup>1</sup> § 79. R. S. 5208.

<sup>2</sup> The word "certify" implies that certain words have been written or printed upon said check and that the check passed from the custody of the bank into the hands of some other party and that an obligation of the bank was created. *United States v. Heinze*, 161 Fed. 425 (1908).

<sup>3</sup> *United States v. Heinze*, 161 Fed. 425 (1908).

<sup>1</sup> § 80. March 3, 1883. Chap. 121.



*sembled*, That the taxes herein specified, imposed by the laws now in force, be, and the same are hereby, repealed as hereinafter provided, namely: *on capital and deposits of banks, bankers, and national banking associations*, except such taxes as are now due and payable: and on and after the first day of July, eighteen hundred and eighty-three, the stamp tax on *bank checks, drafts, orders, and vouchers, etc.*

**§ 81. An Act to enable National Banking Associations to increase their capital Stock, and to change their Names or Locations.<sup>1</sup>**

**Increase of Capital. — Change of Name or Location.** — *Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled*, That any national banking association may, with the approval of the Comptroller of the Currency, by the vote of shareholders owning two thirds of the stock of such association, increase its capital stock, in accordance with existing laws, to any sum approved by the said Comptroller, notwithstanding the limit fixed in its original articles of association, and determined by said Comptroller; and no increase of the capital stock of any national banking association, either within or beyond the limit fixed in its original articles of association shall be made except in the manner herein provided.

Sec. 2. That any national banking association may change its name, or the place where its operations of discount and deposit are to be carried on, to any other place within the same State, not more than thirty miles distant, with the approval of the Comptroller of the Currency, by the vote of shareholders owning two thirds of the stock of such association. A duly authenticated notice of the vote, and of the new name or location selected, shall be sent to the office of the Comptroller of the Currency; but no change of name or location shall be valid until the Comptroller shall have issued his certificate of approval of the same.

Sec. 3. That all debts, liabilities, rights, provisions, and powers of the association under its old name shall devolve upon and inure to the association under its new name.

Sec. 4. That nothing in this act shall be so construed as in any manner to release any national banking association under its old name, or at its old location, from any liability, or affect

<sup>1</sup> § 81. May 1, 1886. Chap. 73.

any action or proceeding in law in which said association may be, or become, a party interested.

§ 82. An Act to amend the Act of Congress approved March third, eighteen hundred and seventy-five, entitled, "An act to determine the Jurisdiction of Circuit Courts of the United States, and to regulate the Removal of Circuit from State Courts, and for other Purposes, and to further regulate the Jurisdiction of Circuit Courts of the United States, and for other Purposes."<sup>1</sup>

**Jurisdiction.** — Sec. 4. That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the Circuit and District Courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.

The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States, or by direction of any officer thereof, or cases for winding up the affairs of any such bank.<sup>2</sup>

§ 83. An Act to amend Sections five thousand one hundred and ninety-one and five thousand one hundred and ninety-two of the Revised Statutes of the United States, and for other Purposes.<sup>1</sup>

"Reserve" and "Central Reserves" Cities. — *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That, whenever three fourths in number of the national banks located in any city of the United States having a population of fifty thousand people shall make application to the Comptroller of the Currency in writing, asking that the name of the city in which such banks are located, shall

<sup>1</sup> § 82. March 3, 1887. Chap. 373. See §§ 57 and 70.

<sup>2</sup> A suit in equity brought by the receiver of an insolvent national bank by direction of the Comptroller of the Currency to enforce liability due to the bank and to dispose of a considerable part of the assets, is one for winding up the affairs of the bank. *McCartney v. Earle*, 115 Fed. 462 (1902).

<sup>1</sup> § 83. March 3, 1887. Chap. 378. R. S. 5191, 5192, 5195.

be added to the cities named in sections fifty-one hundred and ninety-one and fifty-one hundred and ninety-two of the Revised Statutes, the Comptroller shall have authority to grant such request, and every bank located in such city shall at all times thereafter have on hand, in lawful money of the United States, an amount equal to at least twenty-five per centum of its deposits, as provided in section fifty-one hundred and ninety-one and fifty-one hundred and ninety-five of the Revised Statutes.

Sec. 2. That whenever three fourths in number of the national banks located in any city of the United States having a population of two hundred thousand people shall make application to the Comptroller of the Currency, in writing, asking that such city may be a "central reserve" city, like the city of New York, in which one half of the lawful money reserve of the national banks located in other reserve cities may be deposited, as provided in section fifty-one hundred and ninety-five of the Revised Statutes, the Comptroller shall have authority, with the approval of the Secretary of the Treasury, to grant such request, and every bank located in such city shall, at all times thereafter, have on hand, in lawful money of the United States, twenty-five per centum of its deposits, as provided in section fifty-one hundred and ninety-one of the Revised Statutes.

Sec. 3. That section three of the act of January fourteenth, eighteen hundred and seventy-five, entitled "An Act to provide for the resumption of specie payments", be, and the same is hereby, amended by adding after the words "New York", the words "and the city of San Francisco, California."

§ 83. A. **An Act to correct the enrolment of an act approved March third, eighteen hundred and eighty-seven, entitled "An act to amend sections one, two, three, and ten of an act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from the State Courts, and for other purposes, approved March third, eighteen hundred and seventy-five."**<sup>1</sup>

Sec. 4. That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and

<sup>1</sup> § 83 A. August 13, 1888.

all suits in equity, be deemed citizens of States in which they are respectively located.<sup>2</sup>

And in such cases the circuit and district court shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state.<sup>3</sup>

The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States, or by direction of any officer thereof, or cases for winding up<sup>4</sup> the affairs of any such bank.<sup>5</sup>

§ 83. B. An Act directing the purchase of silver bullion and the issue of Treasury notes thereon, and for other purposes.<sup>1</sup>

Sec. 6. That upon the passage of this act the balances standing with the Treasurer of the United States to the respective credits of national banks for deposits made to redeem the circulating notes of such banks, and all deposits thereafter received for like purpose, shall be covered into the Treasury as a miscellaneous receipt, and the Treasury of the United States shall redeem from the general cash in the Treasury the circulating notes of said banks which may come into his possession subject to redemption;

and upon the certificate of the Comptroller of the Currency that such notes have been received by him and that they have been destroyed and that no new notes will be issued in their place, reimbursement of their amount shall be made to the Treasurer, under such regulation as the Secretary of the Treasury

<sup>2</sup> Wyman v. Wallace, 201 U. S. 230, 50 L. ed. 788, 26 Sup. Ct. 495 (1905). See George v. Wallace, 135 Fed. 286 (1905).

<sup>3</sup> See Continental National Bank v. Buford, 191 U. S. 119, 44 L. ed. 119, 24 Sup. Ct. 54 (1903).

<sup>4</sup> See McCartney v. Earle, 115 Fed. 462, *supra* under § 82.

<sup>5</sup> The effect of this section was to make national banks for the purpose of suing and being sued in the circuit courts of the United States citizens of the states in which they were respectively located, and to withdraw from them the right to invoke the jurisdiction of the circuit courts of the United States simply upon the ground that they were created by and exercised their powers under acts of congress. Continental National Bank v. Buford, 191 U. S. 119, 44 L. ed. 119, 24 Sup. Ct. 54 (1903).

This section was intended to displace and be a substitute for the provisions of section 4 of the law of 1882. George v. Wallace, 135 Fed. 286 (1905); but see Levitan v. Houghton National Bank, 174 Mich. 566, 140 N. W. 1019 (1913), holding that it does not supersede the laws of 1882 *in re* jurisdiction.

<sup>1</sup> § 83 B. July 14, 1890.

may prescribe hereby, created, to be known as national bank note redemption account.

But the provisions of this act shall not apply to the deposits received under section three of the act of June twentieth, eighteen hundred and seventy-four, requiring every national bank to keep in lawful money with the Treasurer of the United States a sum equal to five per centum of the circulation, to be held and used for the redemption of its circulating notes ;

and the balance remaining of the deposits so covered shall, at the close of each month, be reported on the monthly public debt statement as a debt of the United States bearing no interest.

**§ 83. C. An Act to amend the national bank act in providing for the redemption of national bank notes stolen from or lost by banks of issue.<sup>1</sup>**

*Be it enacted, etc.,* That the provisions of the Revised Statutes of the United States providing for the redemption of national bank notes shall apply to all national bank notes that have been or may be issued to, or received by, any national bank, notwithstanding such notes may have been lost or stolen from the bank and put in circulation without the signature or upon the forged signature of the president or vice-president and cashier.

**§ 83. D. An Act to amend an act entitled "An Act authorizing the appointment of receivers of national banks, and for other purposes", approved June thirtieth, eighteen hundred and seventy-six.<sup>1</sup>**

*Be it enacted, etc.,* That section three of "An Act authorizing the appointment of receivers of national banks, and for other purposes, approved June thirtieth, eighteen hundred and seventy-six" is hereby amended so as to read as follows :

Sec. 3. That whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section fifty-two hundred and thirty-four and other sections of the Revised Statutes of the United States.

and when, as provided in sec. 5236 thereof, the Comptroller of the Currency shall have paid to each and every creditor of such association, not including the shareholders, who are

<sup>1</sup> § 83 C. July, 1892.

<sup>1</sup> § 83 D. August 3, 1892.

creditors of such association, whose claim or claims as such creditors shall have been proved or allowed as therein prescribed, the full amount of such claims, and all expenses of the receivership of such claims, and all expenses of the receivership and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States.

the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city, or county where the business of such association was carried on, or, if no newspaper is there published, in the newspaper published nearest thereto.

At such meeting the shareholders shall determine whether the receiver shall be continued, and shall wind up the affairs of such association, or whether an agent shall be elected for that purpose, and in so determining the said shareholders shall vote by a ballot in person or by proxy, each share of stock entitling the holder to one vote, and the majority of the stock in value and number of shares shall be necessary to determine whether the said receiver shall be continued or whether an agent shall be elected.

In case such majority shall determine that the said receiver shall be continued, the said receiver shall thereupon proceed with the execution of his trust and shall sell, dispose of, or otherwise collect the assets of the said association and shall possess all the powers and authority, and be subject to all the duties and liabilities originally conferred or imposed upon him by his appointment as such receiver, so far as the same remain applicable.

In case the said meeting shall, by the vote of a majority of the stock in values and number of shares, determine that an agent shall be elected, the said meeting shall thereupon proceed to elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the person who shall receive votes representing at least a majority of stock in value and number shall be declared the agent for the purposes hereinafter provided ;

and whenever any of the shareholders of the association shall, after the election of such agent, have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of each and every

claim that may thereafter be proved and allowed by and before a competent court, and for the faithful performance of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets of such association then remaining in the hands or subject to the order and control of said Comptroller and said receiver or either of them ;

and for this purpose said Comptroller and said receiver are hereby severally empowered and directed to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper, and upon the execution and delivery of such instrument to the said agent the said Comptroller and the said receiver shall by virtue of this Act be discharged from any and all liabilities to such association, and to each and all the creditors and shareholders thereof.

Upon receiving such deed, assignment, transfer, or other instrument, the person elected such agent shall hold, control, and dispose of the assets and property of such association which he may receive under the terms hereof, for the benefit of the shareholders of such association, and he may in his own name, or in the name of such association, sue and be sued, and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands, and may sell, compromise, or compound the debts due to such association, with the consent and approval of the circuit or district court of United States for the district where the business of such association was carried on.

and shall at the conclusion of his trust render to such district or circuit court a full account of all his proceedings, receipts, and expenditures as such agent, which court shall, upon due notice, settle and adjust such accounts and discharge said agent and the sureties upon said bond.

At such meeting, held as hereinbefore provided, administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians of minors, and trustees of other persons may so act and sign for their ward or wards or *cestui que trust*.

The proceeds of the assets or property of any such association which may be undistributed at the time of such meeting or may be subsequently received shall be distributed as follows ;

“First. To pay the expenses of the execution of the trust to the date of such payment.

"Second. To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency in accordance with the provisions of the statutes of the United States; and

"Third. The balance ratably among such stockholders in proportion to the number of shares held and owned by each. Such distribution shall be made, from time to time, as the proceeds shall be received and as shall be deemed advisable by the said Comptroller or said agent."

§ 83. E. **An Act to amend an act entitled "An Act authorizing the appointment of receiver of national banks and for other purpose", approved June thirtieth, eighteen hundred and seventy-six, amended by an Act approved the third day of August, eighteen hundred and ninety-two.**<sup>1</sup>

*Be it enacted, etc.,* That section three of an Act entitled "An Act authorizing the appointment of receivers of national banks and for other purposes", be, and hereby is, amended so as to read as follows;

Sec. 3. That whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section fifty-two hundred and thirty-four and other sections of the Revised Statutes of the United States.

and when, as provided in section fifty-two hundred and thirty-six thereof, the Comptroller of the Currency shall have paid to each and every creditor of such association, not including shareholders, who are creditors of such association, whose claim or claims as such creditors shall have been proved or allowed as therein prescribed, the full amount of such claims, and all expenses of the receivership and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States.

the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city, or county where the business of such association was carried on, or, if no news-

<sup>1</sup> § 83 E. March 2, 1897.



paper is there published, in the newspaper published nearest thereto.

At such meeting the shareholders shall determine whether the receiver shall be continued, and shall wind up the affairs of such association, or whether an agent shall be elected for that purpose, and in so determining the said shareholders shall vote by a ballot in person or by proxy, each share of stock entitling the holder to one vote, and the majority of the stock in value and number of shares shall be necessary to determine whether the said receiver shall be continued or whether an agent shall be elected.

In case such majority shall determine that the said receiver shall be continued, the said receiver shall thereupon proceed with the execution of his trust and shall sell, dispose of, or otherwise collect the assets of the said association and shall possess all the powers and authority, and be subject to all the duties and liabilities originally conferred or imposed upon him by his appointment as such receiver, so far as the same remains applicable.

In case the said meeting shall by the vote of a majority of the stock in value and number of shares determine that an agent shall be elected, the said meeting shall thereupon proceed to elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the person who shall receive votes representing at least a majority of stock in value and number shall be declared the agent for the purposes hereinafter provided ;

and whenever any of the shareholders of the association shall, after the election of such agent have executed and filed a bond to the satisfaction of the Comptroller of Currency, conditional for the payment and discharge in full of each and every claim that may thereafter be proved and allowed by and before a competent court, and for the faithful performance of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets of such association then remaining in the hands or subject to the order and control of said Comptroller and said receiver or either of them ;

and for this purpose said Comptroller and said receiver are hereby severally empowered and directed to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper ;

and upon the execution and delivery of such instrument to the said agent the said Comptroller and the said receiver shall by virtue of this Act be discharged from any and all liabilities to such association, and to each and all the creditors and shareholders thereof.

Upon receiving such deed, assignment, transfer, or other instrument, the person elected such agent shall hold, control, and dispose of the assets and property of such association which he may receive under the terms hereof, for the benefit of the shareholders of such association, and he may in his own name, or in the name of such association, sue and be sued, and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands, and may sell, compromise, or compound the debts due to such association, with the consent and approval of the circuit or district court of the United States for the district where the business of such association was carried on ;

and shall at the conclusion of his trust render to such district or circuit court a full account of all his proceedings, receipts, and expenditures as such agent, which court shall, upon due notice, settle and adjust such accounts and discharge said agent and the sureties upon said bond.

And in case any such agent so elected shall refuse to serve, or die, resign, or be removed, any shareholder may call a meeting of the shareholders of such association in the town, city, or village where the business of said association was carried on, by giving notice thereof for thirty days in a newspaper published in said town, city, or village, or if no newspaper is there published, in the newspaper published nearest thereto ;

at which meeting the shareholders shall elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote,

and when such agent shall have received votes representing at least a majority of the stock in value and number of shares,

and shall have executed a bond to the shareholders conditioned for the faithful performance of his duties, in the penalty fixed by the shareholders at said meeting, with two sureties, to be approved by a judge of a court of record in the county where the business of said association was carried on, he shall have all the rights, powers, and duties of the agent first elected as hereinbefore provided.

At any meeting, held as hereinbefore provided, administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians of minors, and trustees of other persons may so act and sign for their ward or wards or *cestui que trust*.

The proceeds of the assets or property of any such association which may be undistributed at the time of such meeting or may be subsequently received shall be distributed as follows:

“First. To pay the expenses of the execution of the trust to the date of such payment.

“Second. To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency in accordance with the provisions of the statutes of the United States; and

“Third. The balance ratably among such stockholders in proportion to the number of shares held and owned by each. Such distribution shall be made, from time to time, as the proceeds shall be received and as shall be deemed advisable by the said Comptroller or said agent.”

**§ 83 F. An Act to define and fix the standard of value, to maintain the parity of all forms of money issued or coined by the United States, to refund the public debt, and for other purposes.<sup>1</sup>**

SEC. 10. That section fifty-one hundred and thirty-eight of the Revised Statutes is hereby amended so as to read as follows:

“Section 5138. No association shall be organized with a less capital than one hundred thousand dollars, except that banks with a capital of not less than fifty thousand dollars may, with the approval of the Secretary of the Treasury, be organized in any place the population of which does not exceed six thousand inhabitants, and except that banks with a capital of not less than twenty-five thousand dollars may, with the sanction of the Secretary of the Treasury, be organized in any place the population of which does not exceed three thousand inhabitants. No association shall be organized in a city the population of which

<sup>1</sup> § 83 F. March 14, 1900.

exceeds fifty thousand persons with a capital of less than two hundred thousand dollars."

SEC. 12. That upon the deposit with the Treasurer of the United States by any national banking association, of any bonds of the United States in the manner provided by existing law, such association shall be entitled to receive from the Comptroller of the Currency circulating notes in blank, registered and countersigned as provided by law, equal in amount to the par value of the bonds so deposited; and any national banking association now having bonds on deposit for the security of circulating notes, and upon which an amount of circulating notes has been issued less than the par value of the bonds, shall be entitled, upon due application to the Comptroller of the Currency, to receive additional circulating notes in blank to an amount which will increase the circulating notes held by such association to the par value of the bonds deposited, such additional notes to be held and treated in the same way as the circulating notes of national banking associations heretofore issued, and subject to all the provisions of law affecting such notes. *Provided*, That nothing herein contained shall be construed to modify or repeal the provisions of section fifty-one hundred and sixty-seven of the Revised Statutes of the United States authorizing the Comptroller of the Currency to require additional deposits of bonds or of lawful money in case the market value of the bonds held to receive the circulating notes shall fall below the par value of the circulating notes outstanding for which such bonds may be deposited as security:

*And provided further*, That the circulating notes furnished to national banking associations under the provisions of their Act shall be of the denominations prescribed by law, except that no national banking association shall after the passage of this Act, be entitled to receive from the Comptroller of the Currency, or to issue or reissue or place in circulation, more than one third in amount of its circulating notes of the denomination of five dollars:

*And provided further*, That the total amount of such notes issued at any such association may equal at any time but shall not exceed the amount at such time of its capital stock actually paid in:

*And provided further*, That under regulations to be prescribed by the Secretary of the Treasury, any national banking association may substitute the two per centum bonds issued under the

provisions of this Act for any of the bonds deposited with the Treasurer to secure circulation or to secure deposits of public money; and so much of an Act entitled "An Act to enable national banking associations to extend their corporate existence, and for other purposes", approved July twelfth, eighteen hundred and eighty-two, as prohibits any national bank which makes any deposit of lawful money in order to withdraw its circulating notes from receiving any increase of its circulation for the period of six months from the time it made such deposit of lawful money for the purpose aforesaid; is hereby repealed, and all other Acts or parts of Acts inconsistent with the provisions of this section are hereby repealed.

SEC. 13. That every national banking association having on deposit, as provided by law, bonds of United States bearing interest at the rate of two per centum per annum, issued under the provisions of this Act, to secure its circulating notes, shall pay to the Treasurer of the United States, in the months of January and July, a tax of one fourth of one per centum each half year upon the average amount of such of its notes in circulation as are based upon the deposit of said two per centum bonds; and such taxes shall be in lieu of existing taxes on its notes in circulation imposed by section fifty-two hundred and fourteen of Revised Statutes.

**§ 83 G. An Act to amend section fifty-one hundred and fifty-three of the Revised Statutes of the United States <sup>1</sup>**

*Be it enacted, etc., the United States of America in Congress assembled,* That section fifty-one hundred and fifty-three of the Revised Statutes of the United States be amended to read as follows;

"SEC. 5153. All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositories of public money, except receipts from customs, under such regulations as may be prescribed by the Secretary, but receipts derived from duties on imports in Alaska, the Hawaiian Islands, and other islands under the jurisdiction of the United States may be deposited in such depositories subject to such regulations; and such depositories may also be employed as financial agents of the Government; and they perform all such reason-

<sup>1</sup> § 83 G. March 3, 1901.

able duties as depositaries of public moneys and financial agents of the Government as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government. And every association so designated as receiver or depositary of public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue or for loans or stocks."

**§ 83 H. An Act to provide for the extension of the charters of national banks**<sup>1</sup>

*Be it enacted, etc.,* That the Comptroller of the Currency is hereby authorized, in the manner provided by, and under the conditions and limitations of, the Act of July twelfth, eighteen hundred and eighty-two, to extend for a further period of twenty years the charter of any national banking association extended under said Act which shall desire to continue its existence after the expiration of its charter.

**§ 84. Full Text of the Laws of the United States Relating to Banking passed in 1874, 1875, and 1876,**

WHICH, ALTHOUGH NOTED IN THE REVISED STATUTES OF 1878, ARE NOT FULLY INCORPORATED THEREIN, BUT ARE STILL THE FINAL EVIDENCE OF THE LAW, AND IN CASE OF DISCREPANCY CONTROL THE REVISED STATUTES OF 1878.

**(a) An Act fixing the Amount of United States Notes, providing for a Re-distribution of National Bank Currency, and for other Purposes**

SEC. 1. *Be it enacted, etc.,* That the act entitled "An Act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June third, eighteen hundred and sixty-four, shall hereafter be known as the "National Bank Act."

SEC. 2. That section thirty-one of the National Bank Act be so amended that the several associations therein provided for shall not hereafter be required to keep on hand any amount of money whatever by reason of the amount of their respective

<sup>1</sup> § 83 H. April 12, 1902.

circulations; but the moneys required by said section to be kept at all times on hand shall be determined by the amount of deposits in all respects as provided for in the said section.

SEC. 3. That every association organized, or to be organized, under the provisions of the said act, and of the several acts amendatory thereof, shall at all times keep and have on deposit in the Treasury of the United States, in lawful money of the United States, a sum equal to five per centum of its circulation; to be held and used for the redemption of such circulation; which sum shall be counted as a part of its lawful reserve, as provided in section two of this act; and when the circulating notes of any such associations, assorted or unassorted, shall be presented for redemption, in sums of one thousand dollars or any multiple thereof, to the Treasurer of the United States, the same shall be redeemed in United States notes. All notes so redeemed shall be charged by the Treasurer of the United States to the respective associations issuing the same, and he shall notify them severally on the first day of each month, or oftener, at his discretion, of the amount of such redemptions; and whenever such redemptions for any association shall amount to the sum of five hundred dollars, such association so notified shall forthwith deposit with the Treasurer of the United States a sum in United States notes equal to the amount of its circulating notes so redeemed. And all notes of national banks, worn, defaced, mutilated, or otherwise unfit for circulation, shall, when received by any Assistant Treasurer, or at any designated depository of the United States, be forwarded to the Treasurer of the United States for redemption, as provided herein. And when such redemptions have been so reimbursed, the circulating notes so redeemed shall be forwarded to the respective associations by which they were issued; but if any of such notes are worn, mutilated, defaced, or rendered otherwise unfit for use, they shall be forwarded to the Comptroller of the Currency and destroyed, and replaced as now provided by law: *Provided*, That each of said associations shall reimburse to the Treasury the charges for transportation and the cost for assorting such notes; and the associations hereafter organized shall also severally reimburse to the Treasury the cost of engraving such plates as shall be ordered by each association respectively; and the amount assessed upon each association shall be in proportion to the circulation redeemed, and be charged to the fund on deposit with the Treasurer: *and provided, further*, That so much of section thirty-two of said National Bank Act

requiring or permitting the redemption of its circulating notes elsewhere than at its own counter, except as provided for in this section, is hereby repealed.

SEC. 4. That any association organized under this act, or any of the acts of which this is an amendment, desiring to withdraw its circulating notes, in whole or in part, may, upon the deposit of lawful money with the Treasurer of the United States in sums of not less than nine thousand dollars, take up the bonds which said association has on deposit with the Treasurer for the security of such circulating notes, which bonds shall be assigned to the bank in the manner specified in the nineteenth section of the National Bank Act; and the outstanding notes of said association, to an amount equal to the legal tender notes deposited, shall be redeemed at the Treasury of the United States, and destroyed as now provided by law: *Provided*, That the amount of the bonds of deposit for circulation shall not be reduced below fifty thousand dollars.

SEC. 5. That the Comptroller of the Currency shall, under such rules and regulations as the Secretary of the Treasury may prescribe, cause the charter numbers of the association to be printed upon all national bank notes which may be hereafter issued by him.

SEC. 6. That the amount of United States notes outstanding and to be used as a part of the circulating medium shall not exceed the sum of three hundred and eighty-two million dollars, which said sum shall appear in each monthly statement of the public debt, and no part thereof shall be held or used as a reserve.

SEC. 7. That so much of the act entitled "An Act to provide for the redemption of the three per cent temporary loan certificates, and for an increase of national bank notes," as provides that no circulation shall be withdrawn under the provisions of section six of said act, until after the fifty-four millions granted in section one of said act shall have been taken up, is hereby repealed; and it shall be the duty of the Comptroller of the Currency, under the direction of the Secretary of the Treasury, to proceed forthwith, and he is hereby authorized, and required, from time to time, as applications shall be duly made therefor, and until the full amount of fifty-five million dollars shall be withdrawn, to make requisitions upon each of the national banks described in said section, and in the maner therein provided, organized in States having an excess of circulation, to withdraw and return so much of their circulation as by said act may be apportioned to be withdrawn from them, or, in lieu thereof, to deposit in the Treasury of the United States



lawful money sufficient to redeem such circulation ; and upon the return of the circulation required, or the deposit of lawful money, as herein provided, a proportionate amount of the bonds held to secure the circulation of such association as shall make such return or deposit shall be surrendered to it.

SEC. 8. That upon the failure of the national banks upon which requisition for circulation shall be made, or of any of them, to return the amount required, or to deposit in the Treasury lawful money to redeem the circulation required, within thirty days, the Comptroller of the Currency shall at once sell, as provided in section forty-nine of the National Currency Act, approved June third, eighteen hundred and sixty-four, bonds held to secure the redemption of the circulation of the association or associations which shall so fail, to an amount sufficient to redeem the circulation required of such association or associations, and with the proceeds, which shall be deposited in the Treasury of the United States, so much of the circulation of such association or associations shall be redeemed as will equal the amount required and not returned ; and, if there be an excess of proceeds over the amount required for such redemption, it shall be returned to the association or associations whose bonds shall have been sold. And it shall be the duty of the Treasurer, Assistant Treasurers, designated depositaries, and national bank depositaries of the United States, who shall be kept informed by the Comptroller of the Currency of such associations as shall fail to return circulation as required, to assort and return to the Treasury for redemption the notes of such associations as shall come into their hands until the amount required shall be redeemed, and in like manner to assort and return to the Treasury, for redemption, the notes of such national banks as have failed or gone into voluntary liquidation for the purpose of winding up their affairs, and of such as shall hereafter so fail or go into liquidation.

SEC. 9. That from and after the passage of this act it shall be lawful for the Comptroller of the Currency, and he is hereby required, to issue circulating notes, without delay, as applications therefor are made, not to exceed the sum of fifty-five million dollars, to associations organized or to be organized in those States and Territories having less than their proportion of circulation, under an apportionment made on the basis of population and of wealth as shown by the returns of the census of eighteen hundred and seventy ; and every association hereafter organized shall be

subject to, and be governed by, the rules, restrictions, and limitations, and possess the rights, privileges, and franchises, now or hereafter to be prescribed by law as to national banking associations, with the same power to amend, alter, and repeal provided by the National Banking Act; *Provided*, That the whole amount of circulation withdrawn and redeemed from banks transacting business shall not exceed fifty-five million dollars, and that such circulation shall be withdrawn and redeemed as it shall be necessary to supply the circulation previously issued to the banks in those States having less than their apportionment: *and provided, further*, That not more than thirty million dollars shall be withdrawn and redeemed as herein contemplated during the fiscal year ending June thirtieth, eighteen hundred and seventy-five.

Approved June 20, 1874.

**(b) An Act to provide for the Resumption of Specie Payments**

*Be it enacted, etc.*, That the Secretary of the Treasury is hereby authorized and required, as rapidly as practicable, to cause to be coined, at the mints of the United States, silver coins of the denominations of ten, twenty-five, and fifty cents, of standard value, and to issue them in redemption of an equal number and amount of fractional currency of similar denominations, or, at his discretion, he may issue such silver coins through the mints, the sub-treasuries, public depositories, and post-offices of the United States; and, upon such issue, he is hereby authorized and required to redeem an equal amount of such fractional currency, until the whole amount of such fractional currency outstanding shall be redeemed.

SEC. 2. That so much of section three thousand five hundred and twenty-four of the Revised Statutes of the United States as provides for a charge of one fifth of one per centum for converting standard gold bullion into coin is hereby repealed; and hereafter no charge shall be made for that service.

SEC. 3. That section five thousand one hundred and seventy-seven of the Revised Statutes, limiting the aggregate amount of circulating notes of national banking associations, be, and is hereby, repealed; and each existing banking association may increase its circulating notes in accordance with existing law without respect to said aggregate limit; and new banking associations may be organized in accordance with existing law without respect

to said aggregate limit; and the provisions of law for the withdrawal and redistribution of national bank currency among the several States and Territories are hereby repealed. And whenever, and so often, as circulating notes shall be issued to any such banking association, so increasing its capital or circulating notes, or so newly organized as aforesaid, it shall be the duty of the Secretary of the Treasury to redeem the legal tender United States notes in excess only of three hundred million of dollars, to the amount of eighty per centum of the sum of national bank notes so issued to any such banking association as aforesaid, and to continue such redemption as such circulating notes are issued until there shall be outstanding the sum of three hundred million dollars of such legal tender United States notes, and no more. And on and after the first day of January, anno Domini eighteen hundred and seventy-nine, the Secretary of the Treasury shall redeem, in coin, the United States legal tender notes then outstanding, on their presentation for redemption at the office of the Assistant Treasurer of the United States in the city of New York, in sums of not less than fifty dollars. And to enable the Secretary of the Treasury to prepare and provide for the redemption in this act authorized or required, he is authorized to use any surplus revenues, from time to time, in the Treasury, not otherwise appropriated, and to issue, sell, and dispose of, at not less than par, in coin, either of the descriptions of bonds of the United States described in the act of Congress approved July fourteenth, eighteen hundred and seventy, entitled "An Act to authorize the refunding of the national debt," with like qualities, privileges, and exemptions, to the extent necessary to carry this act into full effect, and to use the proceeds thereof for the purpose aforesaid. And all provisions of law inconsistent with the provisions of this act are hereby repealed.

Approved January 14, 1875.

**(c) An Act to remove the Limitation restricting the Circulation of Banking Associations issuing Notes payable in Gold**

*Be it enacted, etc.,* That so much of section five thousand one hundred and eighty-five of the Revised Statutes of the United States as limits the circulation of banking associations, organized for the purpose of issuing notes payable in gold, severally to one million dollars, be, and the same is hereby, repealed; and each

of such existing banking associations may increase its circulating notes, and new banking associations may be organized, in accordance with existing law, without respect to such limitation.

Approved January 19, 1875.

(d) **An Act to amend existing Customs and Internal Revenue Laws, and for Other Purposes**

SEC. 15. *Be it enacted, etc.*, That the words "bank check, draft, or order for the payment of any sum of money whatsoever, drawn upon any bank, banker, or trust company, at sight or on demand, two cents," in Schedule D of the act of June thirtieth, eighteen hundred and sixty-four, be, and the same are hereby, stricken out, and the following paragraph inserted in lieu thereof :

"Bank check, draft, order, or voucher for the payment of any sum of money whatsoever, drawn upon any bank, banker or trust company, two cents."

SEC. 19. That every person, firm, association other than national bank associations, and every corporation, State bank, or State banking association, shall pay a tax of ten per centum on the amount of their own notes used for circulation and paid out by them.

SEC. 20. That every such person, firm, association, corporation, State bank, or State banking association, and also every national banking association, shall pay a like tax of ten per centum on the amount of notes of any person, firm, association other than a national banking association, or of any corporation, State bank, or State banking association, or of any town, city, or municipal corporation, used for circulation and paid out by them.

SEC. 21. That the amount of such circulating notes, and of the tax due thereon, shall be returned, and the tax paid at the same time, and in the same manner, and with like penalties for failure to return and pay the same, as provided by law for the return and payment of taxes on deposits, capital, and circulation, imposed by the existing provisions of internal revenue law.

Approved February 8, 1875.

(e) **Extract from an Act to correct Errors and to supply Omissions in the Revised Statutes of the United States**

*Be it enacted*, That for the purpose of correcting errors and supplying omissions in the act entitled "An Act to revise and

consolidate the statutes of the United States in force on the first day of December, anno Domini one thousand eight hundred and seventy-three", so as to make the same truly express such laws, the following amendments are hereby made therein: . . .

Section three hundred and thirty is amended by adding thereto the following: "A description of the seal, with an impression thereof, and a certificate of approval by the Secretary of the Treasury, shall be filed in the office of the Secretary of State."

Section three hundred and thirty-three is amended by inserting after the word "Congress", in the second line, the words "at the commencement of its session."

Section six hundred and twenty-nine is amended by striking out, in the first line of paragraph eleven, the words "or against."

Section three thousand four hundred and seventeen is amended by inserting in the fourth line, after the word "twelve", the words "thirty-four hundred and thirteen."

Section three thousand eight hundred and eleven is amended by striking out "Secretary of the Treasury", and inserting "Comptroller of the Currency"; also, by adding, after the word "banks", in the second line, the words "and banks under State and Territorial laws."

Section five thousand one hundred and eighty-three is amended by inserting, after the word "issue", in the second line, the words "post notes or."

Section five thousand one hundred and ninety-eight is amended by adding thereto the following: "That suits, actions, and proceedings against any association under this Title may be had in any Circuit, District, or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

Section five thousand two hundred and twenty-four is amended by adding thereto the following: "And if any such bank shall fail to make the deposit and take up its bonds for thirty days after the expiration of the time specified, the Comptroller of the Currency shall have power to sell the bonds pledged for the circulation of said bank, at public auction in New York City, and, after providing for the redemption and cancellation of said circulation and the necessary expenses of the sale, to pay over any balance remaining to the bank or its legal representative."

Section five thousand two hundred and twenty-eight is amended by striking out in the third line the words " of forfeiture of the bonds ", and inserting the word " thereof."

Section five thousand four hundred and thirteen is amended by inserting in the third line, after the word " national ", the word " bank."

Approved February 18, 1875.

(f) **An Act to amend Section five thousand two hundred and forty of the Revised Statutes of the United States relating to Compensation of National Bank Examiners.**

*Be it enacted*, That section five thousand two hundred and forty of the Revised Statutes of the United States be so amended that the latter clause of said section, after the word " Comptroller " in the eighth line of said section [*the tenth line of this work*], be amended so that the same shall read as follows, namely: " That all persons appointed to be examiners of national banks not located in the redemption cities specified in section five thousand one hundred and ninety-two of the Revised Statutes of the United States, or in any one of the States of Oregon, California, and Nevada, or in the Territories, shall receive compensation for such examination as follows: For examining national banks having a capital less than one hundred thousand dollars, twenty dollars; those having a capital of one hundred thousand dollars and less than three hundred thousand dollars, twenty-five dollars; those having a capital of three hundred thousand dollars and less than four hundred thousand dollars, thirty-five dollars; those having a capital of four hundred thousand dollars and less than five hundred thousand dollars, forty dollars; those having a capital of five hundred thousand dollars and less than six hundred thousand dollars, fifty dollars; those having a capital of six hundred thousand dollars and over, seventy-five dollars; which amounts shall be assessed by the Comptroller of the Currency upon, and paid by, the respective associations so examined, and shall be in lieu of the compensation and mileage heretofore allowed for making said examinations; and persons appointed to make examination of national banks in the cities named in section five thousand one hundred and ninety-two of the Revised Statutes of the United States, or in any one of the States of Oregon, California, and Nevada, or in the Territories, shall receive such compensation as

may be fixed by the Secretary of the Treasury upon the recommendation of the Comptroller of the Currency; and the same shall be assessed and paid in the manner hereinbefore provided."

Approved February 19, 1875.

**(g) An Act authorizing the Appointment of Receivers of National Banks, and for other Purposes**

*Be it enacted*, That whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section fifty-two hundred and thirty-nine of the Revised Statutes of the United States, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court, stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the Comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver, who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section fifty-two hundred and thirty-four of said statutes.

SEC. 2. That when any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes, the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes may be enforced by any creditor of such association, by bill in equity in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established.<sup>1</sup>

<sup>1</sup> Under this section the circuit court has jurisdiction in a case against a stockholder by suit in the nature of a creditor's bill, independently of diverse citizenship, and the decree of the circuit court of appeals is not final, but an appeal will lie to the supreme court. *Wyman v. Wallace*, 201 U. S. 230, 50 L. ed. 738, 26 Sup. Ct. 495 (1906).

The remedy by creditor's bill is cumulative and not exclusive. *King v. Pomeroy*, 121 Fed. 287 (1903). It is not essential that the demand be final. *George v. Wallace*, 135 Fed. 286 (1905); but, as the provisions of this section is the only authorized procedure in enforcing the individual liability of stockholders when the bank goes into voluntary liquidation,

SEC. 3. That whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section fifty-two hundred and thirty-four and other sections of said statutes, and when, as provided in section fifty-two hundred and thirty-six thereof, the Comptroller shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved, or allowed as therein prescribed, the full amount of such claims and all expenses of the receivership, and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city, or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto, at which meeting the shareholders shall elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote; and when such agent shall have received votes representing at least a majority of the stock in value and number of shares, and when any of the shareholders of the association shall have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditional for the payment and discharge in full of any and every claim that may hereafter be proved and allowed against such association by and before a competent court, and for the faithful performance and discharge of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets and property of such association then remaining in the hands or subject to the order or control of said Comptroller and said receiver, or either of them; and for this purpose, said Comptroller and said receiver are hereby severally empowered to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper; whereupon the said Comptroller and the said receiver shall, by virtue of this act, be discharged and released from any and all liabilities to such association, and to each and all of the creditors and share-

it is essential that the suit be brought in the district where the bank was located or established and it should be against the bank and all its stockholders. *Williamson v. American Bank*, 115 Fed. 793 (1902).



holders thereof; and such agent is hereby authorized to sell, compromise, or compound the debts due to such association upon the order of a competent court of record or of the United States Circuit Court for the district where the business of the association was carried on. Such agent shall hold, control, and dispose of the assets and property of any association which he may receive as hereinbefore provided for the benefit of the shareholders of such association as they, or a majority of them in value or number of shares, may direct, distributing such assets and property among such shareholders in proportion to the shares held by each; and he may in his own name, or in the name of such association, sue and be sued, and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands. In selecting an agent as hereinbefore provided, administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians may so act and sign for their ward or wards.

SEC. 4. That the last clause of section fifty-two hundred and five of said statutes is hereby amended by adding to the said section the following proviso:

*“And provided, That if any shareholder or shareholders of such bank shall neglect or refuse, after three months’ notice, to pay the assessment, as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days’ notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto) to make good the deficiency; and the balance, if any, shall be returned to such delinquent shareholder or shareholders.”*

SEC. 5. That all United States officers charged with the receipt or disbursement of public moneys, and all officers of national banks, shall stamp or write in plain letters the word “counterfeit”, “altered”, or “worthless”, upon all fraudulent notes issued in the form of, and intended to circulate as money, which shall be presented at their places of business; and if such officers shall wrongfully stamp any genuine note of the United States, or of the national banks, they shall, upon presentation, redeem such notes at the face value thereof.

SEC. 6. That all savings banks or savings and trust companies

organized under authority of any act of Congress shall be, and are hereby, required to make to the Comptroller of the Currency, and publish, all the reports which national banking associations are required to make and publish under the provisions of sections fifty-two hundred and eleven, fifty-two hundred and twelve, and fifty-two hundred and thirteen of the Revised Statutes, and shall be subject to the same penalties for failure to make or publish such reports as are therein provided; which penalties may be collected by suit before any court of the United States in the district in which said savings banks or savings and trust companies may be located. And all savings or other banks now organized, or which shall hereafter be organized, in the District of Columbia, under any act of Congress, which shall have capital stock paid up in whole or in part, shall be subject to all the provisions of the Revised Statutes, and of all acts of Congress applicable to national banking associations, so far as the same may be applicable to such savings or other banks: *Provided*, that such savings banks now established shall not be required to have a paid-in capital exceeding one hundred thousand dollars.

Approved June 30, 1876.

## AN ACT TO AMEND THE NATIONAL BANKING LAWS

### § 84 A.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That national banking associations, each having an unimpaired capital and a surplus of not less than twenty per centum, not less than ten in number, having an aggregate capital and surplus of at least five millions of dollars, may form voluntary associations to be designated as national currency associations. The banks uniting to form such association shall, by their presidents or vice-presidents, acting under authority from the board of directors, make and file with the Secretary of the Treasury a certificate setting forth the names of the banks composing the association, the principal place of business of the association, and the name of the association, which name shall be subject to the approval of the Secretary of the Treasury. Upon the filing of such certificate the associated banks therein named shall become a body corporate, and by the name so designated and approved may sue and be sued

and exercise the powers of a body corporate for the purposes hereinafter mentioned: *Provided*, That not more than one such national currency association shall be formed in any city: *Provided further*, That the several members of such national currency association shall be taken, as nearly as conveniently may be, from a territory composed of a State or part of a State, or contiguous parts of one or more States: *And provided further*, That any national bank in such city or territory, having the qualifications herein prescribed for membership in such national currency association, shall, upon its application to and upon the approval of the Secretary of the Treasury, be admitted to membership in a national currency association for that city or territory, and upon such admission shall be deemed and held a part of the body corporate, and as such entitled to all the rights and privileges and subject to all the liabilities of an original member: *And provided further*, That each national currency association shall be composed exclusively of banks not members of any other national currency association.

The dissolution, voluntary or otherwise, of any bank in such association shall not affect the corporate existence of the association unless there shall then remain less than the minimum number of ten banks: *Provided, however*, That the reduction of the number of said banks below the minimum of ten shall not affect the existence of the corporation with respect to the assertion of all rights in favor of or against such association. The affairs of the association shall be managed by a board consisting of one representative from each bank. By-laws for the government of the association shall be made by the board, subject to the approval of the Secretary of the Treasury. A president, vice-president, secretary, treasurer, and an executive committee of not less than five members, shall be elected by the board. The powers of such board, except in the election of officers and making of by-laws, may be exercised through its executive committee.

The national currency association herein provided for shall have and exercise any and all powers necessary to carry out the purposes of this section, namely, to render available, under the direction and control of the Secretary of the Treasury, as a basis for additional circulation any securities, including commercial paper, held by a national banking association. For the purpose of obtaining such additional circulation, any bank belonging to any national currency association, having circulating notes outstand-

ing secured by the deposit of bonds of the United States to an amount not less than forty per centum of its capital stock, and which has its capital unimpaired and a surplus of not less than twenty per centum, may deposit with and transfer to the association, in trust for the United States, for the purpose hereinafter provided, such of the securities above mentioned as may be satisfactory to the board of the association. The officers of the association may thereupon, in behalf of such bank, make application to the Comptroller of the Currency for an issue of additional circulating notes to an amount not exceeding seventy-five per centum of the cash value of the securities or commercial paper so deposited. The Comptroller of the Currency shall immediately transmit such application to the Secretary of the Treasury with such recommendation as he thinks proper, and if, in the judgment of the Secretary of the Treasury, business conditions in the locality demand additional circulation, and if he be satisfied with the character and value of the securities proposed and that a lien in favor of the United States on the securities so deposited and on the assets of the banks composing the association will be amply sufficient for the protection of the United States, he may direct an issue of additional circulating notes to the association, on behalf of such bank, to an amount in his discretion, not, however, exceeding seventy-five per centum of the cash value of the securities so deposited: *Provided*, That upon the deposit of any of the State, city, town, county, or other municipal bonds, of a character described in section three of this Act, circulating notes may be issued to the extent of not exceeding ninety per centum of the market value of such bonds so deposited: *And provided further*, That no national banking association shall be authorized in any event to issue circulating notes based on commercial paper in excess of thirty per centum of its unimpaired capital and surplus. The term "commercial paper" shall be held to include only notes representing actual commercial transactions, which when accepted by the association shall bear the names of at least two responsible parties and have not exceeding four months to run.

The banks and the assets of all banks belonging to the association shall be jointly and severally liable to the United States for the redemption of such additional circulation; and to secure such liability the lien created by section fifty-two hundred and thirty of the Revised Statutes shall extend to and cover the assets of all banks belonging to the association, and to the securities deposited

by the banks with the association pursuant to the provisions of this Act; but as between the several banks composing such association each bank shall be liable only in the proportion that its capital and surplus bears to the aggregate capital and surplus of all such banks. The association may, at any time, require of any of its constituent banks a deposit of additional securities or commercial paper, or an exchange of the securities already on deposit, to secure such additional circulation; and in case of the failure of such bank to make such deposit or exchange the association may, after ten days' notice to the bank, sell the securities and paper already in its hands at public sale, and deposit the proceeds with the Treasurer of the United States as a fund for the redemption of such additional circulation. If such fund be insufficient for that purpose the association may recover from the bank the amount of the deficiency by suit in the circuit court of the United States, and shall have the benefit of the lien hereinbefore provided for in favor of the United States upon the assets of such bank. The association or the Secretary of the Treasury may permit or require the withdrawal of any such securities or commercial paper and the substitution of other securities or commercial paper of equal value therefor.

SEC. 2. That whenever any bank belonging to a national currency association shall fail to preserve or make good its redemption fund in the Treasury of the United States, required by section three of the Act of June twentieth, eighteen hundred and seventy-four, chapter three hundred and forty-three, and the provisions of this Act, the Treasurer of the United States shall notify such national currency association to make good such redemption fund, and upon the failure of such national currency association to make good such fund, the Treasurer of the United States may, in his discretion, apply so much of the redemption fund belonging to the other banks composing such national currency association as may be necessary for that purpose; and such national currency association may, after five days' notice to such bank, proceed to sell at public sale the securities deposited by such bank with the association pursuant to the provisions of section one of this Act, and deposit the proceeds with the Treasurer of the United States as a fund for the redemption of the additional circulation taken out by such bank under this Act.

SEC. 3. That any national banking association which has circulating notes outstanding, secured by the deposit of United States

bonds to an amount of not less than forty per centum of its capital stock, and which has a surplus of not less than twenty per centum, may make application to the Comptroller of the Currency for authority to issue additional circulating notes to be secured by the deposit of bonds other than bonds of the United States. The Comptroller of the Currency shall transmit immediately the application, with his recommendation, to the Secretary of the Treasury, who shall, if in his judgment business conditions in the locality demand additional circulation, approve the same, and shall determine the time of issue and fix the amount, within the limitations herein imposed, of the additional circulating notes to be issued. Whenever after receiving notice of such approval any such association shall deposit with the Treasurer or any assistant treasurer of the United States such of the bonds described in this section as shall be approved in character and amount by the Treasurer of the United States and the Secretary of the Treasury, it shall be entitled to receive, upon the order of the Comptroller of the Currency, circulating notes in blank, registered and countersigned as provided by law, not exceeding in amount ninety per centum of the market value, but not in excess of the par value of any bonds so deposited, such market value to be ascertained and determined under the direction of the Secretary of the Treasury.

The Treasurer of the United States, with the approval of the Secretary of the Treasury, shall accept as security for the additional circulating notes provided for in this section, bonds or other interest-bearing obligations of any State of the United States, or any legally authorized bonds issued by any city, town, county, or other legally constituted municipality or district in the United States which has been in existence for a period of ten years, and which for a period of ten years previous to such deposit has not defaulted in the payment of any part of either principal or interest of any funded debt authorized to be contracted by it, and whose net funded indebtedness does not exceed ten per centum of the valuation of its taxable property, to be ascertained by the last preceding valuation of property for the assessment of taxes. The Treasurer of the United States, with the approval of the Secretary of the Treasury, shall accept, for the purposes of this section, securities herein enumerated in such proportions as he may from time to time determine, and he may with such approval at any time require the deposit of additional securities, or require any

association to change the character of the securities already on deposit.

SEC. 4. That the legal title of all bonds, whether coupon or registered, deposited to secure circulating notes issued in accordance with the terms of section three of this Act shall be transferred to the Treasurer of the United States in trust for the association depositing them, under regulations to be prescribed by the Secretary of the Treasury. A receipt shall be given to the association by the Treasurer or any assistant treasurer of the United States, stating that such bond is held in trust for the association on whose behalf the transfer is made, and as security for the redemption and payment of any circulating notes that have been or may be delivered to such association. No assignment or transfer of any such bond by the Treasurer shall be deemed valid unless countersigned by the Comptroller of the Currency. The provisions of sections fifty-one hundred and sixty-three, fifty-one hundred and sixty-four, fifty-one hundred and sixty-five, fifty-one hundred and sixty-six, and fifty-one hundred and sixty-seven and sections fifty-two hundred and twenty-four to fifty-two hundred and thirty-four, inclusive, of the Revised Statutes respecting United States bonds deposited to secure circulating notes shall, except as herein modified, be applicable to all bonds deposited under the terms of section three of this Act.

SEC. 5. That the additional circulating notes issued under this Act shall be used, held, and treated in the same way as circulating notes of national banking associations heretofore issued and secured by a deposit of United States bonds, and shall be subject to all the provisions of law affecting such notes except as herein expressly modified: *Provided*, That the total amount of circulating notes outstanding of any national banking association, including notes secured by United States bonds as now provided by law, and notes secured otherwise than by deposit of such bonds, shall not at any time exceed the amount of its unimpaired capital and surplus: *And provided further*, That there shall not be outstanding at any time circulating notes issued under the provisions of this Act to an amount of more than five hundred millions of dollars.

SEC. 6. That whenever and so long as any national banking association has outstanding any of the additional circulating notes authorized to be issued by the provisions of this Act it shall keep on deposit in the Treasury of the United States, in addition to the

redemption fund required by section three of the Act of June twentieth, eighteen hundred and seventy-four, an additional sum equal to five per centum of such additional circulation at any time outstanding, such additional five per centum to be treated, held, and used in all respects in the same manner as the original redemption fund provided for by said section three of the Act of June twentieth, eighteen hundred and seventy-four.

SEC. 7. In order that the distribution of notes to be issued under the provisions of this Act shall be made as equitable as practicable between the various sections of the country, the Secretary of the Treasury shall not approve applications from associations in any State in excess of the amount to which such State would be entitled of the additional notes herein authorized on the basis of the proportion which the unimpaired capital and surplus of the national banking associations in such State bears to the total amount of unimpaired capital and surplus of the national banking associations of the United States: *Provided, however,* That in case the applications from associations in any State shall not be equal to the amount which the associations of such State would be entitled to under this method of distribution, the Secretary of the Treasury may, in his discretion, to meet an emergency, assign the amount not thus applied for to any applying association or associations in States in the same section of the country.

SEC. 8. That it shall be the duty of the Secretary of the Treasury to obtain information with reference to the value and character of the securities authorized to be accepted under the provisions of this Act, and he shall from time to time furnish information to national banking associations as to such securities as would be acceptable under the provisions of this Act.

SEC. 9. That section fifty-two hundred and fourteen of the Revised Statutes, as amended, be further amended to read as follows: <sup>1</sup>

“SEC. 5214. National banking associations having on deposit bonds of the United States, bearing interest at the rate of two per centum per annum, including the bonds issued for the construction of the Panama Canal, under the provisions of section eight of ‘An Act to provide for the construction of a canal connecting the waters of the Atlantic and Pacific oceans’, approved June

<sup>1</sup> § 84 A. See § 199 A.



twenty-eighth, nineteen hundred and two, to secure its circulating notes, shall pay to the Treasurer of the United States, in the months of January and July, a tax of one-fourth of one per centum each half year upon the average amount of such of its notes in circulation as are based upon the deposit of such bonds; and such associations having on deposit bonds of the United States bearing interest at a rate higher than two per centum per annum shall pay a tax of one-half of one per centum each half year upon the average amount of such of its notes in circulation as are based upon the deposit of such bonds. National banking associations having circulating notes secured otherwise than by bonds of the United States shall pay for the first month a tax at the rate of five per centum per annum upon the average amount of such of their notes in circulation as are based upon the deposit of such securities, and afterwards an additional tax of one per centum per annum for each month until a tax of ten per centum per annum is reached, and thereafter such tax of ten per centum per annum, upon the average amount of such notes. Every national banking association having outstanding circulating notes secured by a deposit of other securities than United States bonds shall make monthly returns, under oath of its president or cashier, to the Treasurer of the United States, in such form as the Treasurer may prescribe, of the average monthly amount of its notes so secured in circulation; and it shall be the duty of the Comptroller of the Currency to cause such reports of notes in circulation to be verified by examination of the banks' records. The taxes received on circulating notes secured otherwise than by bonds of the United States shall be paid into the Division of Redemption of the Treasury and credited and added to the reserve fund held for the redemption of United States and other notes."

SEC. 10. That section nine of the Act approved July twelfth, eighteen hundred and eighty-two, as amended by the Act approved March fourth, nineteen hundred and seven, be further amended to read as follows:

"SEC. 9. That any national banking association desiring to withdraw its circulating notes, secured by deposit of United States bonds in the manner provided in section four of the Act approved June twentieth, eighteen hundred and seventy-four, is hereby authorized for that purpose to deposit lawful money with the Treasurer of the United States and, with the consent of the Comptroller of the Currency and the approval of the Secretary of the Treasury,

to withdraw a proportionate amount of bonds held as security for its circulating notes in the order of such deposits: *Provided*, That not more than nine millions of dollars of lawful money shall be so deposited during any calendar month for this purpose.

“Any national banking association desiring to withdraw any of its circulating notes, secured by the deposit of securities other than bonds of the United States, may make such withdrawal at any time in like manner and effect by the deposit of lawful money or national bank notes with the Treasurer of the United States, and upon such deposit a proportionate share of the securities so deposited may be withdrawn: *Provided*, That the deposits under this section to retire notes secured by the deposit of securities other than bonds of the United States shall not be covered into the Treasury, as required by section six of an Act entitled ‘An Act directing the purchase of silver bullion and the issue of Treasury notes thereon, and for other purposes’, approved July fourteenth, eighteen hundred and ninety, but shall be retained in the Treasury for the purpose of redeeming the notes of the bank making such deposit.”

SEC. 11. That section fifty-one hundred and seventy-two of the Revised Statutes be, and the same is hereby, amended to read as follows: <sup>2</sup>

“SEC. 5172. In order to furnish suitable notes for circulation, the Comptroller of the Currency shall, under the direction of the Secretary of the Treasury, cause plates and dies to be engraved, in the best manner to guard against counterfeiting and fraudulent alterations, and shall have printed therefrom, and numbered, such quantity of circulating notes, in blank, of the denominations of five dollars, ten dollars, twenty dollars, fifty dollars, one hundred dollars, five hundred dollars, one thousand dollars, and ten thousand dollars, as may be required to supply the associations entitled to receive the same. Such notes shall state upon their face that they are secured by United States bonds or other securities, certified by the written or engraved signatures of the Treasurer and Register and by the imprint of the seal of the Treasury. They shall also express upon their face the promise of the association receiving the same to pay on demand, attested by the signature of the president or vice-president and cashier. The Comptroller of the Currency, acting under the direction of the Secretary of the

<sup>2</sup> See § 199 E.

Treasury, shall as soon as practicable cause to be prepared circulating notes in blank, registered and countersigned, as provided by law, to an amount equal to fifty per centum of the capital stock of each national banking association; such notes to be deposited in the Treasury or in the subtreasury of the United States nearest the place of business of each association, and to be held for such association, subject to the order of the Comptroller of the Currency, for their delivery as provided by law: *Provided*, That the Comptroller of the Currency may issue national bank notes of the present form until plates can be prepared and circulating notes issued as above provided: *Provided, however*, That in no event shall bank notes of the present form be issued to any bank as additional circulation provided for by this Act."

SEC. 12. That circulating notes of national banking associations, when presented to the Treasury for redemption, as provided in section three of the Act approved June twentieth, eighteen hundred and seventy-four, shall be redeemed in lawful money of the United States.

SEC. 13. That all acts and orders of the Comptroller of the Currency and the Treasurer of the United States authorized by this Act shall have the approval of the Secretary of the Treasury who shall have power, also, to make any such rules and regulations and exercise such control over the organization and management of national currency associations as may be necessary to carry out the purposes of this Act.

SEC. 14. That the provisions of section fifty-one hundred and ninety-one of the Revised Statutes, with reference to the reserves of national banking associations, shall not apply to deposits of public moneys by the United States in designated depositaries.

SEC. 15. That all national banking associations designated as regular depositaries of public money shall pay upon all special and additional deposits made by the Secretary of the Treasury in such depositaries, and all such associations designated as temporary depositaries of public money shall pay upon all sums of public money deposited in such associations interest at such rate as the Secretary of the Treasury may prescribe, not less, however, than one per centum per annum upon the average monthly amount of such deposits: *Provided, however*, That nothing contained in this Act shall be construed to change or modify the obligation of any association or any of its officers for the safekeeping of public

money: *Provided further*, That the rate of interest charged upon such deposits shall be equal and uniform throughout the United States.

SEC. 16. That a sum sufficient to carry out the purposes of the preceding sections of this Act is hereby appropriated out of any money in the Treasury not otherwise appropriated.

SEC. 17. That a Commission is hereby created, to be called the "National Monetary Commission", to be composed of nine members of the Senate, to be appointed by the Presiding Officer thereof, and nine members of the House of Representatives, to be appointed by the Speaker thereof; and any vacancy on the Commission shall be filled in the same manner as the original appointment.

SEC. 18. That it shall be the duty of this Commission to inquire into and report to Congress at the earliest date practicable, what changes are necessary or desirable in the monetary system of the United States or in the laws relating to banking and currency, and for this purpose they are authorized to sit during the sessions or recess of Congress, at such times and places as they may deem desirable, to send for persons and papers, to administer oaths, to summons and compel the attendance of witnesses, and to employ a disbursing officer and such secretaries, experts, stenographers, messengers, and other assistants as shall be necessary to carry out the purposes for which said Commission was created. The Commission shall have the power, through subcommittee or otherwise, to examine witnesses and to make such investigations and examinations, in this or other countries, of the subjects committed to their charge as they shall deem necessary.

SEC. 19. That a sum sufficient to carry out the purposes of sections seventeen and eighteen of this Act, and to pay the necessary expenses of the Commission and its members, is hereby appropriated, out of any money in the Treasury not otherwise appropriated. Said appropriation shall be immediately available and shall be paid out on the audit and order of the chairman or acting chairman of said Commission, which audit and order shall be conclusive and binding upon all Departments as to the correctness of the accounts of such Commission.<sup>3</sup>

<sup>3</sup>No one receiving a salary or emolument from the Government of the United States, in any capacity, shall receive any salary or emolument as a member or employee of said commission from the date of the passage of this act; *Provided*, That voluntary assistance, without com-

SEC. 20. That this Act shall expire by limitation on the thirtieth day of June, nineteen hundred and fourteen.<sup>4</sup>

Approved, May 30, 1908.

pensation, may be accepted by the commission from present employees or from others whose assistance may be desired by the commission. Act, August 22, 1911, c. 36, § 4, 37 Stat. 30.

<sup>4</sup> See § 199 E.

## THE FEDERAL RESERVE ACT

AS AMENDED BY THE ACTS APPROVED AUGUST 4 AND AUGUST 15, 1914;  
AND MARCH 3, 1915

85. Definition of terms.
86. Federal reserve districts — organization committee.
87. Authority of committee.
88. Acceptance of terms of act.
89. Subscriptions to capital stock.
90. Responsibility of shareholders.
91. Failure of national banks to accept terms of act — penalty.
92. Failure of national banks to become member banks — penalty.
93. Public subscriptions — when accepted.
94. Limit to stock held by any individual copartnership or corporation other than a member bank. Public stock, how transferable.
95. Allotment of stock to United States.
96. Voting power.
97. Transfer of stock.
98. Minimum capital of Federal reserve bank.
99. Reserve cities, status of.
100. Authority of organization committee to employ assistants.
101. Branches of Federal reserve banks.
102. Organization of Federal reserve banks. Application for stock by national banks.
103. Organization certificate.
104. Powers of Federal reserve banks.
105. Directors of Federal reserve banks.
106. Classification of directors.
107. Election of class A and class B directors.
108. Appointment of class C directors. Federal reserve agent, duties of.
109. Compensation of directors.
110. Organization of Federal reserve banks. Authority of organization committee.
111. First meeting of directors. Designation of terms of office.
112. Increase and decrease of capital stock.
113. Increase of capital stock.
114. Applications for capital stock.
115. Certificate of increase in stock of Federal reserve bank.
116. Reduction of capital stock.
117. Insolvency of member bank.
118. Division of earnings.
119. Tax exemptions.

## THE FEDERAL RESERVE ACT

120. Conversion of State banks into national banks.
121. State banks may subscribe.
122. Applications for membership.
123. Regulations and restrictions.
124. Member banks required to make same reports as national banks and subject to provisions and penalties of sections 5198, 5200, 5201, 5208, 5209, 5211, 5212, and 5213, United States Revised Statutes.
125. Failure to comply with regulations — penalty.
126. Federal Reserve Board.
127. Governor and vice governor; officers; qualification of members.
128. Provision for expenses.
129. First meeting of board; Secretary of Treasury chairman of board.
130. Member of Federal Reserve Board not to be officer, director, or stockholder in any banking institution or trust company.
131. Vacancies on board — how filled.
132. Powers of Secretary of Treasury.
133. Federal Reserve Board to make annual report to Speaker of the House of Representatives.
134. Comptroller of the Currency.
135. Powers of Federal Reserve Board.
136. Federal Reserve Board may examine books of Federal reserve banks and member banks and require reports.
137. Rediscounts.
138. Suspension of reserve requirements.
139. Issuance and retirement of Federal reserve notes.
140. Reserve cities.
141. Suspension or removal of officer or director of a Federal reserve bank.
142. Writing off doubtful or worthless assets.
143. Federal Reserve Board may suspend the operations of any Federal reserve bank.
144. Requirement of bonds from Federal reserve agents and authority to make necessary regulations under this act.
145. General supervision.
146. Permit to national banks to act as trustee, executor, administrator, or registrar of stocks and bonds.
147. Employment of attorneys, clerks, etc., and provision for payment of salaries.
148. Federal advisory council.
149. Powers of Federal advisory council.
150. Powers of Federal reserve banks.
151. Rediscounts — notes, drafts, and bills of exchange.
152. Acceptances and limitations thereof.
153. Exceptions as to limit of indebtedness.
154. Open-market operations.
155. Government deposits.
156. Federal reserve notes authorized.
157. Applications for Federal reserve notes.
158. Reserve requirements for Federal reserve banks.
159. Issuance and redemption of Federal reserve notes. No Federal reserve bank permitted to pay out notes issued through another Federal reserve bank.
160. Deposits of gold with Treasurer for redemption of Federal reserve notes.

## THE FEDERAL RESERVE ACT

161. Federal Reserve Board may grant or reject application of Federal reserve bank for Federal reserve notes. Federal reserve notes first lien on all the assets of the bank.
162. Reduction of note issues.
163. Substitution of collateral.
164. Preparation of Federal reserve notes. Plates and dies to be under control of Comptroller of Currency. Where notes are to be deposited.
165. Appropriation for expense of printing national-bank notes may be used for printing Federal reserve notes.
166. When Federal reserve bank shall receive checks and drafts on deposit at par.
167. Charges for collection and for sale of exchange.
168. National banks not required to make deposit of United States bonds prior to commencement of business.
169. Refunding bonds. Retirement of circulating notes.
170. Purchase of United States bonds by Federal reserve banks.
171. Issue of circulating notes to Federal reserve banks on security of United States bonds. Circulating notes so issued obligations of Federal reserve bank.
172. Issue of gold notes of the United States in exchange for certain United States bonds.
173. Bank reserves. Demand and time deposits defined.
174. Reserve requirements, when effective.
175. Reserve requirements for banks not in reserve cities.
176. Reserve requirements for banks in reserve cities.
177. Reserve requirements for banks in central reserve cities.
178. Federal reserve bank may receive from member bank eligible paper as reserve — amount not to exceed one-half of each instalment.
179. Reserve requirements for State banks and trust companies.
180. Member bank forbidden to keep on deposit with nonmember bank a sum in excess of ten per cent of its own capital and surplus or to secure discounts for nonmember bank.
181. Withdrawal of reserve by member bank.
182. Reserve requirement, how estimated.
183. Reserve requirements for national banks located in Alaska or outside the continental United States.
184. Redemption fund with Treasurer not to be counted as reserve.
185. Bank examinations. Appointment and powers of examiners. Acceptance of reports of examinations by State authority.
186. Salaries of bank examiners.
187. Examinations by Federal reserve bank.
188. Examinations of Federal reserve banks.
189. Loans and gratuities to bank examiners forbidden. National bank examiners not permitted to perform any other service for compensation while holding such office for any bank or officer or employee thereof.
190. Officers or employees not permitted to receive any fee or other consideration in connection with any business of the bank other than the salary or the director's fee. Examiners forbidden to disclose the names of borrowers or the collateral for loans to other than the proper officers.
191. Liability of stockholders of national banks.
192. Loans on farm lands.



193. Foreign branches.
194. Repeal of provisions of law inconsistent with the provisions of the Federal reserve act.
195. Act of May 30, 1908, extended to June 30, 1915. Reenactment of certain sections of Revised Statutes.
196. Rate of taxation on circulating notes secured otherwise than by bonds of United States. When Secretary of Treasury is authorized to suspend limitations of act of May 30, 1908.
197. Reduction of capital of national banks.
198. Invalidation of clause, etc., in act not to invalidate remainder of act.
199. Reservation of right to amend or repeal.

### Title of Act

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the short title of this Act shall be the "Federal Reserve Act."*

§ 85. **Definition of Terms.** — Whenever the word "bank" is used in this Act, the word shall be held to include State bank, banking association, and trust company, except where national banks or Federal reserve banks are specifically referred to.

The terms "national bank" and "national banking association" used in this Act shall be held to be synonymous and interchangeable. The term "member bank" shall be held to mean any national bank, State bank, or bank or trust company which has become a member of one of the reserve banks created by this Act. The term "board" shall be held to mean Federal Reserve Board; the term "district" shall be held to mean Federal Reserve district; the term "reserve bank" shall be held to mean Federal reserve bank.

§ 86. (2) **Federal Reserve Districts — Organization Committee.** — As soon as practicable, the Secretary of the Treasury, the Secretary of Agriculture and the Comptroller of the Currency, acting as "The Reserve Bank Organization Committee", shall designate not less than eight nor more than twelve cities to be known as Federal reserve cities, and shall divide the continental United States, excluding Alaska, into districts, each district to contain only one of such Federal reserve cities. The determination of said organization committee shall not be subject to review except by the Federal Reserve Board when organized: *Provided*, That the districts shall be apportioned with due regard to the convenience and customary course of business and shall not necessarily be coterminous with any State or States. The districts

thus created may be readjusted and new districts may from time to time be created by the Federal Reserve Board, not to exceed twelve in all. Such districts shall be known as Federal reserve districts and may be designated by number. A majority of the organization committee shall constitute a quorum with authority to act.

§ 87. **Authority of Committee.** — Said organization committee shall be authorized to employ counsel and expert aid, to take testimony, to send for persons and papers, to administer oaths, and to make such investigation as may be deemed necessary by the said committee in determining the reserve districts and in designating the cities within such districts where such Federal reserve banks shall be severally located. The said committee shall supervise the organization in each of the cities designated of a Federal reserve bank, which shall include in its title the name of the city in which it is situated, as "Federal Reserve Bank of Chicago."

§ 88. **Acceptance of Terms of Act.** — Under regulations to be prescribed by the organization committee, every national banking association in the United States is hereby required, and every eligible bank in the United States and every trust company within the District of Columbia, is hereby authorized to signify in writing, within sixty days after the passage of this Act, its acceptance of the terms and provisions hereof.

§ 89. **Subscriptions to Capital Stock.** — When the organization committee shall have designated the cities in which Federal reserve banks are to be organized, and fixed the geographical limits of the Federal reserve districts, every national banking association within that district shall be required within thirty days after notice from the organization committee, to subscribe to the capital stock of such Federal reserve bank in a sum equal to six per centum of the paid-up capital stock and surplus of such bank, one-sixth of the subscription to be payable on call of the organization committee or of the Federal Reserve Board, one-sixth within three months and one-sixth within six months thereafter, and the remainder of the subscription, or any part thereof, shall be subject to call when deemed necessary by the Federal Reserve Board, said payments to be in gold or gold certificates.

§ 90. **Responsibility of Shareholders.** — The shareholders of every Federal reserve bank shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and

engagements of such bank to the extent of the amount of their subscriptions to such stock at the par value thereof in addition to the amount subscribed, whether such subscriptions have been paid up in whole or in part, under the provisions of this Act.

§ 91. **Failure of National Banks to Accept Terms of Act — Penalty.** — Any national bank failing to signify its acceptance of the terms of this Act within the sixty days aforesaid, shall cease to act as a reserve agent, upon thirty days' notice, to be given within the discretion of the said organization committee or of the Federal Reserve Board.

§ 92. **Failure of National Banks to Become Member Banks — Penalty.** — Should any national banking association in the United States now organized fail within one year after the passage of this Act to become a member bank or fail to comply with any of the provisions of this Act applicable thereto, all of the rights, privileges, and franchises of such association granted to it under the national-bank Act, or under the provisions of this Act, shall be thereby forfeited. Any noncompliance with or violation of this Act shall, however, be determined and adjudged by any court of the United States of competent jurisdiction in a suit brought for that purpose in the district or territory in which such bank is located, under direction of the Federal Reserve Board, by the Comptroller of the Currency in his own name before the association shall be declared dissolved. In cases of such noncompliance or violation, other than the failure to become a member bank under the provisions of this Act, every director who participated in or assented to the same shall be held liable in his personal or individual capacity for all damages which said bank, its shareholders, or any other person shall have sustained in consequence of such violation.

Such dissolution shall not take away or impair any remedy against such corporation, its stockholders or officers, for any liability or penalty which shall have been previously incurred.

§ 93. **Public Subscriptions — when Accepted.** — Should the subscriptions by banks to the stock of said Federal reserve banks or any one or more of them be, in the judgment of the organization committee, insufficient to provide the amount of capital required therefor, then and in that event the said organization committee may, under conditions and regulations to be prescribed by it, offer to public subscription at par such an amount of stock in said Federal reserve banks, or any one or more of them, as said

committee shall determine, subject to the same conditions as to payment and stock liability as provided for member banks.

**§ 94. Limit to Stock held by any Individual, Copartnership, or Corporation other than a Member Bank. Public Stock, how Transferable.**—No individual, copartnership, or corporation other than a member bank of its district shall be permitted to subscribe for or to hold at any time more than \$25,000 par value of stock in any Federal reserve bank. Such stock shall be known as public stock and may be transferred on the books of the Federal reserve bank by the chairman of the board of directors of such bank.

**§ 95. Allotment of Stock to United States.**—Should the total subscriptions by banks and the public to the stock of said Federal reserve banks, or any one or more of them, be, in the judgment of the organization committee, insufficient to provide the amount of capital required therefor, then and in that event the said organization committee shall allot to the United States such an amount of said stock as said committee shall determine. Said United States stock shall be paid for at par out of any money in the Treasury not otherwise appropriated, and shall be held by the Secretary of the Treasury and disposed of for the benefit of the United States in such manner, at such times, and at such price, not less than par, as the Secretary of the Treasury shall determine.

**§ 96. Voting Power.**—Stock not held by member banks shall not be entitled to voting power.

**§ 97. Transfer of Stock.**—The Federal Reserve Board is hereby empowered to adopt and promulgate rules and regulations governing the transfers of said stock.

**§ 98. Minimum Capital of Federal Reserve Bank.**—No Federal reserve bank shall commence business with a subscribed capital less than \$4,000,000.

**§ 99. Reserve Cities, Status of.**—The organization of reserve districts and Federal reserve cities shall not be construed as changing the present status of reserve cities and central reserve cities, except in so far as this Act changes the amount of reserves that may be carried with approved reserve agents located therein.

**§ 100. Authority of Organization Committee to Employ Assistants.**—The organization committee shall have power to appoint such assistants and incur such expenses in carrying out the provisions of this Act as it shall deem necessary, and such expenses shall be payable by the Treasurer of the United States

upon voucher approved by the Secretary of the Treasury, and the sum of \$100,000, or so much thereof as may be necessary, is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, for the payment of such expenses.

§ 101. (3) **Branches of Federal Reserve Banks.** — Each Federal reserve bank shall establish branch banks within the Federal reserve district in which it is located and may do so in the district of any Federal reserve bank which may have been suspended. Such branches shall be operated by a board of directors under rules and regulations approved by the Federal Reserve Board. Directors of branch banks shall possess the same qualifications as directors of the Federal reserve banks. Four of said directors shall be selected by the reserve bank and three by the Federal Reserve Board, and they shall hold office during the pleasure, respectively, of the parent bank and the Federal Reserve Board. The reserve bank shall designate one of the directors as manager.

#### FEDERAL RESERVE BANKS

§ 102. (4) **Organization of Federal Reserve Banks. Application for Stock by National Banks.** — When the organization committee shall have established Federal reserve districts as provided in section two of this Act, a certificate shall be filed with the Comptroller of the Currency showing the geographical limits of such districts and the Federal reserve city designated in each of such districts. The Comptroller of the Currency shall thereupon cause to be forwarded to each national bank located in each district, and to such other banks declared to be eligible by the organization committee which may apply therefor, an application blank in form to be approved by the organization committee, which blank shall contain a resolution to be adopted by the board of directors of each bank executing such application, authorizing a subscription to the capital stock of the Federal reserve bank organizing in that district in accordance with the provisions of this Act.

§ 103. **Organization Certificate.** — When the minimum amount of capital stock prescribed by this Act for the organization of any Federal reserve bank shall have been subscribed and allotted, the organization committee shall designate any five banks of those whose applications have been received, to execute a certificate of organization, and thereupon the banks so designated shall,

under their seals, make an organization certificate which shall specifically state the name of such Federal reserve bank, the territorial extent of the district over which the operations of such Federal reserve bank are to be carried on, the city and State in which said bank is to be located, the amount of capital stock and the number of shares into which the same is divided, the name and place of doing business of each bank executing such certificate, and of all banks which have subscribed to the capital stock of such Federal reserve bank and the number of shares subscribed by each, and the fact that the certificate is made to enable those banks executing same, and all banks which have subscribed or may thereafter subscribe to the capital stock of such Federal reserve bank, to avail themselves of the advantages of this Act.

The said organization certificate shall be acknowledged before a judge of some court of record or notary public; and shall be, together with the acknowledgment thereof, authenticated by the seal of such court, or notary, transmitted to the Comptroller of the Currency, who shall file, record and carefully preserve the same in his office.

§ 104. **Powers of Federal Reserve Banks.**— Upon the filing of such certificate with the Comptroller of the Currency as aforesaid, the said Federal reserve bank shall become a body corporate and as such, and in the name designated in such organization certificate, shall have power —

First. To adopt and use a corporate seal.

Second. To have succession for a period of twenty years from its organization unless it is sooner dissolved by an Act of Congress, or unless its franchise becomes forfeited by some violation of law.

Third. To make contracts.

Fourth. To sue and be sued, complain and defend, in any court of law or equity.

Fifth. To appoint by its board of directors, such officers and employees as are not otherwise provided for in this Act, to define their duties, require bonds of them and fix the penalty thereof, and to dismiss at pleasure such officers or employees.

Sixth. To prescribe by its board of directors, by-laws not inconsistent with law, regulating the manner in which its general business may be conducted, and the privileges granted to it by law may be exercised and enjoyed.

Seventh. To exercise by its board of directors, or duly authorized officers or agents, all powers specifically granted by the provisions

of this Act and such incidental powers as shall be necessary to carry on the business of banking within the limitations prescribed by this Act.

Eighth. Upon deposit with the Treasurer of the United States of any bonds of the United States in the manner provided by existing law relating to national banks, to receive from the Comptroller of the Currency circulating notes in blank, registered and countersigned as provided by law, equal in amount to the par value of the bonds so deposited, such notes to be issued under the same conditions and provisions of law as relate to the issue of circulating notes of national banks secured by bonds of the United States bearing the circulating privilege, except that the issue of such notes shall not be limited to the capital stock of such Federal reserve bank.

But no Federal reserve bank shall transact any business except such as is incidental and necessarily preliminary to its organization until it has been authorized by the Comptroller of the Currency to commence business under the provisions of this Act.

§ 105. **Directors of Federal Reserve Banks.** — Every Federal reserve bank shall be conducted under the supervision and control of a board of directors.

The board of directors shall perform the duties usually appertaining to the office of directors of banking associations and all such duties as are prescribed by law.

Said board shall administer the affairs of said bank fairly and impartially and without discrimination in favor of or against any member bank or banks and shall, subject to the provisions of law and the orders of the Federal Reserve Board, extend to each member bank such discounts, advancements and accommodations as may be safely and reasonably made with due regard for the claims and demands of other member banks.

§ 106. **Classification of Directors.** — Such board of directors shall be selected as hereinafter specified and shall consist of nine members, holding office for three years, and divided into three classes, designated as classes A, B, and C.

Class A shall consist of three members, who shall be chosen by and be representative of the stock-holding banks.

Class B shall consist of three members, who at the time of their election shall be actively engaged in their district in commerce, agriculture or some other industrial pursuit.

Class C shall consist of three members who shall be designated

by the Federal Reserve Board. When the necessary subscriptions to the capital stock have been obtained for the organization of any Federal reserve bank, the Federal Reserve Board shall appoint the class C directors and shall designate one of such directors as chairman of the board to be selected. Pending the designation of such chairman, the organization committee shall exercise the powers and duties appertaining to the office of chairman in the organization of such Federal reserve bank.

No Senator or Representative in Congress shall be a member of the Federal Reserve Board or an officer or a director of a Federal reserve bank.

No director of class B shall be an officer, director, or employee of any bank.

No director of class C shall be an officer, director, employee, or stockholder of any bank.

§ 107. **Election of Class A and Class B Directors.** — Directors of class A and class B shall be chosen in the following manner:

The chairman of the board of directors of the Federal reserve bank of the district in which the bank is situated or, pending the appointment of such chairman, the organization committee shall classify the member banks of the district into three general groups or divisions. Each group shall contain as nearly as may be one-third of the aggregate number of the member banks of the district and shall consist, as nearly as may be, of banks of similar capitalization. The groups shall be designated by number by the chairman.

At a regularly called meeting of the board of directors of each member bank in the district it shall elect by ballot a district reserve elector and shall certify his name to the chairman of the board of directors of the Federal reserve bank of the district. The chairman shall make lists of the district reserve electors thus named by banks in each of the aforesaid three groups and shall transmit one list to each elector in each group.

Each member bank shall be permitted to nominate to the chairman one candidate for director of class A and one candidate for director of class B. The candidates so nominated shall be listed by the chairman, indicating by whom nominated, and a copy of said list shall, within fifteen days after its completion, be furnished by the chairman to each elector.

Every elector shall, within fifteen days after the receipt of the said list, certify to the chairman his first, second, and other choices



of a director of class A and class B, respectively, upon a preferential ballot, on a form furnished by the chairman of the board of directors of the Federal reserve bank of the district. Each elector shall make a cross opposite the name of the first, second, and other choices for a director of class A and for a director of class B, but shall not vote more than one choice for any one candidate.

Any candidate having a majority of all votes cast in the column of first choice shall be declared elected. If no candidate have a majority of all the votes in the first column, then there shall be added together the votes cast by the electors for such candidates in the second column and the votes cast for the several candidates in the first column. If any candidate than have a majority of the electors voting, by adding together the first and second choices, he shall be declared elected. If no candidate have a majority of electors voting when the first and second choices shall have been added, then the votes cast in the third column for other choices shall be added together in like manner, and the candidate then having the highest number of votes shall be declared elected. An immediate report of election shall be declared.

**§ 108. Appointment of Class C Directors. Federal Reserve Agents, Duties of.** — Class C directors shall be appointed by the Federal Reserve Board. They shall have been for at least two years residents of the district for which they are appointed, one of whom shall be designated by said board as chairman of the board of directors of the Federal reserve bank and as “Federal reserve agent.” He shall be a person of tested banking experience; and in addition to his duties as chairman of the board of directors of the Federal reserve bank he shall be required to maintain under regulations to be established by the Federal Reserve Board a local office of said board on the premises of the Federal reserve bank. He shall make regular reports to the Federal Reserve Board, and shall act as its official representative for the performance of the functions conferred upon it by this Act. He shall receive an annual compensation to be fixed by the Federal Reserve Board and paid monthly by the Federal reserve bank to which he is designated. One of the directors of class C, who shall be a person of tested banking experience, shall be appointed by the Federal Reserve Board as deputy chairman and deputy Federal reserve agent to exercise the powers of the chairman of the board and Federal reserve agent in case of absence or disability of his principal.

§ 109. **Compensation of Directors.** — Directors of Federal reserve banks shall receive, in addition to any compensation otherwise provided, a reasonable allowance for necessary expenses in attending meetings of their respective boards, which amount shall be paid by the respective Federal reserve banks. Any compensation that may be provided by boards of directors of Federal reserve banks for directors, officers or employees shall be subject to the approval of the Federal Reserve Board.

§ 110. **Organization of Federal Reserve Banks. Authority of Organization Committee.** — The Reserve Bank Organization Committee may, in organizing Federal reserve banks, call such meetings of bank directors in the several districts as may be necessary to carry out the purposes of this Act, and may exercise the functions herein conferred upon the chairman of the board of directors of each Federal reserve bank pending the complete organization of such bank.

§ 111. **First Meeting of Directors. Designation of Terms of Office.** — At the first meeting of the full board of directors of each Federal reserve bank, it shall be the duty of the directors of classes A, B and C, respectively, to designate one of the members of each class whose term of office shall expire in one year from the first of January nearest the date of such meeting, one whose term of office shall expire at the end of two years from said date, and one whose term of office shall expire at the end of three years from said date. Thereafter every director of a Federal reserve bank chosen as hereinbefore provided shall hold office for a term of three years. Vacancies that may occur in the several classes of directors of Federal reserve banks may be filled in the manner provided for the original selection of such directors, such appointees to hold office for the unexpired terms of their predecessors.

#### STOCK ISSUES; INCREASE AND DECREASE OF CAPITAL

§ 112. (5) **Increase and Decrease of Capital Stock.** — The capital stock of each Federal reserve bank shall be divided into shares of \$100 each. The outstanding capital stock shall be increased from time to time as member banks increase their capital stock and surplus or as additional banks become members, and may be decreased as member banks reduce their capital stock or surplus or cease to be members.

§ 113. **Increase of Capital Stock.** — Shares of the capital stock of Federal reserve banks owned by member banks shall not be transferred or hypothecated. When a member bank increases its capital stock or surplus, it shall thereupon subscribe for an additional amount of capital stock of the Federal reserve bank of its district equal to six per centum of the said increase, one-half of said subscription to be paid in the manner hereinbefore provided for original subscription, and one-half subject to call of the Federal Reserve Board.

§ 114. **Applications for Capital Stock.** — A bank applying for stock in a Federal reserve bank at any time after the organization thereof must subscribe for an amount of the capital stock of the Federal reserve bank equal to six per centum of the paid-up capital stock and surplus of said applicant bank, paying therefor its par value plus one-half of one per centum a month from the period of the last dividend.

§ 115. **Certificate of Increase in Stock of Federal Reserve Bank.** — When the capital stock of any Federal reserve bank shall have been increased either on account of the increase of capital stock of member banks or on account of the increase in the number of member banks, the board of directors shall cause to be executed a certificate to the Comptroller of the Currency showing the increase in capital stock, the amount paid in, and by whom paid.

§ 116. **Reduction of Capital Stock.** — When a member bank reduces its capital stock it shall surrender a proportionate amount of its holdings in the capital of said Federal reserve bank, and when a member bank voluntarily liquidates it shall surrender all of its holdings of the capital stock of said Federal reserve bank and be released from its stock subscription not previously called. In either case the shares surrendered shall be canceled and the member bank shall receive in payment therefor, under regulations to be prescribed by the Federal Reserve Board, a sum equal to its cash-paid subscriptions on the shares surrendered and one-half of one per centum per month from the period of the last dividend, not to exceed the book value thereof, less any liability of such member bank to the Federal reserve bank.

§ 117. (6) **Insolvency of Member Bank.** — If any member bank shall be declared insolvent and a receiver appointed therefor, the stock held by it in said Federal reserve bank shall be canceled, without impairment of its liability, and all cash-paid subscriptions on said stock, with one-half of one per centum per month

from the period of last dividend, not to exceed the book value thereof, shall be first applied to all debts of the insolvent member bank to the Federal reserve bank, and the balance, if any, shall be paid to the receiver of the insolvent bank. Whenever the capital stock of a Federal reserve bank is reduced, either on account of a reduction in capital stock of any member bank or of the liquidation or insolvency of such bank, the board of directors shall cause to be executed a certificate to the Comptroller of the Currency showing such reduction of capital stock and the amount repaid to such bank.

§ 118. (7) **Division of Earnings.** — After all necessary expenses of a Federal reserve bank have been paid or provided for, the stockholders shall be entitled to receive an annual dividend of six per centum on the paid-in capital stock, which dividend shall be cumulative. After the aforesaid dividend claims have been fully met, all the net earnings shall be paid to the United States as a franchise tax, except that one-half of such net earnings shall be paid into a surplus fund until it shall amount to forty per centum of the paid-in capital stock of such bank.

The net earnings derived by the United States from Federal reserve banks shall, in the discretion of the Secretary, be used to supplement the gold reserve held against outstanding United States notes, or shall be applied to the reduction of the outstanding bonded indebtedness of the United States under regulations to be prescribed by the Secretary of the Treasury. Should a Federal reserve bank be dissolved or go into liquidation, any surplus remaining, after the payment of all debts, dividend requirements as hereinbefore provided, and the par value of the stock, shall be paid to and become the property of the United States and shall be similarly applied.

§ 119. **Tax Exemptions.** — Federal reserve banks, including the capital stock and surplus therein, and the income derived therefrom shall be exempt from Federal, State, and local taxation, except taxes upon real estate.

§ 120. (20) **Conversion of State Banks into National Banks.** — Section fifty-one hundred and fifty-four, United States Revised Statutes, is hereby amended to read as follows :

Any bank incorporated by special law of any State or of the United States or organized under the general laws of any State or of the United States and having an unimpaired capital sufficient to entitle it to become a national banking association under the

provisions of the existing laws may, by the vote of the shareholders owning not less than fifty-one per centum of the capital stock of such bank or banking association, with the approval of the Comptroller of the Currency be converted into a national banking association, with any name approved by the Comptroller of the Currency: *Provided, however,* That said conversion shall not be in contravention of the State law. In such case the articles of association and organization certificate may be executed by a majority of the directors of the bank or banking institution, and the certificate shall declare that the owners of fifty-one per centum of the capital stock have authorized the directors to make such certificate and to change or convert the bank or banking institution into a national association. A majority of the directors, after executing the articles of association and the organization certificate, shall have power to execute all other papers and to do whatever may be required to make its organization perfect and complete as a national association. The shares of any such bank may continue to be for the same amount each as they were before the conversion, and the directors may continue to be directors of the association until others are elected or appointed in accordance with the provisions of the statutes of the United States. When the Comptroller has given to such bank or banking association a certificate that the provisions of this Act have been complied with, such bank or banking association, and all its stockholders, officers, and employees, shall have the same powers and privileges, and shall be subject to the same duties, liabilities, and regulations, in all respects, as shall have been prescribed by the Federal Reserve Act and by the national banking Act for associations originally organized as national banking associations.

#### STATE BANKS AS MEMBERS

§ 121. (9) **State Banks may Subscribe.**—Any bank incorporated by special law of any State, or organized under the general laws of any State or of the United States, may make application to the reserve bank organization committee, pending organization, and thereafter to the Federal Reserve Board for the right to subscribe to the stock of the Federal reserve bank organized or to be organized within the Federal reserve district where the applicant is located. The organization committee or the Federal Reserve Board, under such rules and regulations as it may pre-

scribe, subject to the provisions of this section, may permit the applying bank to become a stockholder in the Federal reserve bank of the district in which the applying bank is located. Whenever the organization committee or the Federal Reserve Board shall permit the applying bank to become a stockholder in the Federal reserve bank of the district, stock shall be issued and paid for under the rules and regulations in this Act provided for national banks which become stockholders in Federal reserve banks.

§ 122. **Applications for Membership.** — The organization committee or the Federal Reserve Board shall establish by-laws for the general government of its conduct in acting upon applications made by the State banks and banking associations and trust companies for stock ownership in Federal reserve banks. Such by-laws shall require applying banks not organized under Federal law to comply with the reserve and capital requirements and to submit to the examination and regulations prescribed by the organization committee or by the Federal Reserve Board. No applying bank shall be admitted to membership in a Federal reserve bank unless it possesses a paid-up unimpaired capital sufficient to entitle it to become a national banking association in the place where it is situated, under the provisions of the national banking Act.

§ 123. **Regulations and Restrictions.** — Any bank becoming a member of a Federal reserve bank under the provisions of this section shall, in addition to the regulations and restrictions hereinbefore provided, be required to conform to the provisions of law imposed on the national banks respecting the limitation of liability which may be incurred by any person, firm, or corporation to such banks, the prohibition against making purchase of or loans on stock of such banks, and the withdrawal or impairment of capital, or the payment of unearned dividends, and to such rules and regulations as the Federal Reserve Board may, in pursuance thereof, prescribe.

§ 124. **Member Bank Required to make Same Reports as National Banks and Subject to Provisions and Penalties of Sections 5198, 5200, 5201, 5208, 5209, 5211, 5212, and 5213, United States Revised Statutes.** — Such banks, and the officers, agents, and employees thereof, shall also be subject to the provisions of and to the penalties prescribed by sections fifty-one hundred and ninety-eight, fifty-two hundred, fifty-two hundred one, and

fifty-two hundred and eight, and fifty-two hundred and nine of the Revised Statutes. The member banks shall also be required to make reports of the conditions and of the payments of dividends to the comptroller, as provided in sections fifty-two hundred and eleven and fifty-two hundred and twelve of the Revised Statutes, and shall be subject to the penalties prescribed by section fifty-two hundred and thirteen for the failure to make such report.

§ 125. **Failure to Comply with Regulations — Penalty.** — If at any time it shall appear to the Federal Reserve Board that a member bank has failed to comply with the provisions of this section or the regulations of the Federal Reserve Board, it shall be within the power of the said board, after hearing, to require such bank to surrender its stock in the Federal reserve bank; upon such surrender the Federal reserve bank shall pay the cash-paid subscriptions to the said stock with interest at the rate of one-half of one per centum per month, computed from the last dividend, if earned, not to exceed the book value thereof, less any liability to said Federal reserve bank, except the subscription liability not previously called, which shall be canceled, and said Federal reserve bank shall, upon notice from the Federal Reserve Board, be required to suspend said bank from further privileges of membership, and shall within thirty days of such notice cancel and retire its stock and make payment therefor in the manner herein provided. The Federal Reserve Board may restore membership upon due proof of compliance with the conditions imposed by this section.

§ 126. (10) **Federal Reserve Board.** — A Federal Reserve Board is hereby created which shall consist of seven members, including the Secretary of the Treasury and the Comptroller of the Currency, who shall be members *ex officio*, and five members appointed by the President of the United States, by and with the advice and consent of the Senate. In selecting the five appointive members of the Federal Reserve Board, not more than one of whom shall be selected from any one Federal reserve district, the President shall have due regard to a fair representation of the different commercial, industrial and geographical divisions of the country. The five members of the Federal Reserve Board appointed by the President and confirmed as aforesaid shall devote their entire time to the business of the Federal Reserve Board and shall each receive an annual salary of \$12,000, payable monthly together with actual necessary traveling expenses, and the Comp-

troller of the Currency, as ex officio member of the Federal Reserve Board shall, in addition to the salary now paid him as Comptroller of the Currency, receive the sum of \$7,000 annually for his services as a member of said Board.

The members of said board, the Secretary of the Treasury, the Assistant Secretaries of the Treasury, and the Comptroller of the Currency shall be ineligible during the time they are in office and for two years thereafter to hold any office, position, or employment in any member bank. Of the five members thus appointed by the President at least two shall be persons experienced in banking or finance. One shall be designated by the President to serve for two, one for four, one for six, one for eight, and one for ten years, and thereafter each member so appointed shall serve for a term of ten years unless sooner removed for cause by the President.

**§ 127. Governor and Vice Governor; Officers; Qualification of Members.** — Of the five persons thus appointed, one shall be designated by the President as governor and one as vice governor of the Federal Reserve Board. The governor of the Federal Reserve Board, subject to its supervision, shall be the active executive officer. The Secretary of the Treasury may assign offices in the Department of the Treasury for the use of the Federal Reserve Board. Each member of the Federal Reserve Board shall within fifteen days after notice of appointment make and subscribe to the oath of office.

**§ 128. Provisions for Expenses.** — The Federal Reserve Board shall have power to levy semiannually upon the Federal reserve banks, in proportion to their capital stock and surplus, an assessment sufficient to pay its estimated expenses and the salaries of its members and employees for the half year succeeding the levying of such assessment, together with any deficit carried forward from the preceding half year.

**§ 129. First Meeting of Board. Secretary of Treasury Chairman of Board.** — The first meeting of the Federal Reserve Board shall be held in Washington, District of Columbia, as soon as may be after the passage of this Act, at a date to be fixed by the Reserve Bank Organization Committee. The Secretary of the Treasury shall be ex officio chairman of the Federal Reserve Board.

**§ 130. Member of Federal Reserve Board not to be Officer, Director, or Stockholder in any Banking Institution or Trust Company.** — No member of the Federal Reserve Board shall be



an officer or director of any bank, banking institution, trust company, or Federal reserve bank nor hold stock in any bank, banking institution, or trust company; and before entering upon his duties as a member of the Federal Reserve Board he shall certify under oath to the Secretary of the Treasury that he has complied with this requirement.

§ 131. **Vacancies on Board — How Filled.** — Whenever a vacancy shall occur, other than by expiration of term, among the five members of the Federal Reserve Board appointed by the President, as above provided, a successor shall be appointed by the President, with the advice and consent of the Senate, to fill such vacancy, and when appointed he shall hold office for the unexpired term of the member whose place he is selected to fill.

The President shall have power to fill all vacancies that may happen on the Federal Reserve Board during the recess of the Senate, by granting commissions which shall expire thirty days after the next session of the Senate convenes.

§ 132. **Powers of Secretary of Treasury.** — Nothing in this Act contained shall be construed as taking away any powers heretofore vested by law in the Secretary of the Treasury which relate to the supervision, management, and control of the Treasury Department and bureaus under such department, and wherever any power vested by this Act in the Federal Reserve Board or the Federal reserve agent appears to conflict with the powers of the Secretary of the Treasury, such powers shall be exercised subject to the supervision and control of the Secretary.

§ 133. **Federal Reserve Board to Make Annual Report to Speaker of the House of Representatives.** — The Federal Reserve Board shall annually make a full report of its operations to the Speaker of the House of Representatives, who shall cause the same to be printed for the information of the Congress.

§ 134. **Comptroller of the Currency.** — Section three hundred and twenty-four of the Revised Statutes of the United States shall be amended so as to read as follows: There shall be in the Department of the Treasury a bureau charged with the execution of all laws passed by Congress relating to the issue and regulation of national currency secured by United States bonds and, under the general supervision of the Federal Reserve Board, of all Federal reserve notes, the chief officer of which bureau shall be called the Comptroller of the Currency and shall per-

form his duties under the general direction of the Secretary of the Treasury.

§ 135. (11) **Powers of Federal Reserve Board.** — The Federal Reserve Board shall be authorized and empowered:

§ 136. (a) **Federal Reserve Board may Examine Books of Federal Reserve Banks and Member Banks and Require Reports.** — To examine at its discretion the accounts, books and affairs of each Federal reserve bank and of each member bank and to require such statements and reports as it may deem necessary. The said board shall publish once each week a statement showing the condition of each Federal reserve bank and a consolidated statement for all Federal reserve banks. Such statements shall show in detail the assets and liabilities of the Federal reserve banks, single and combined, and shall furnish full information regarding the character of the money held as reserve and the amount, nature and maturities of the paper and other investments owned or held by Federal reserve banks.

§ 137. (b) **Rediscounts.** — To permit, or, on the affirmative vote of at least five members of the Reserve Board to require Federal reserve banks to rediscount the discounted paper of other Federal reserve banks at rates of interest to be fixed by the Federal Reserve Board.

§ 138. (c) **Suspension of Reserve Requirements.** — To suspend for a period not exceeding thirty days, and from time to time to renew such suspension for periods not exceeding fifteen days, any reserve requirement specified in this Act: *Provided*, That it shall establish a graduated tax upon the amounts by which the reserve requirements of this Act may be permitted to fall below the level hereinafter specified: *And provided further*, That when the gold reserve held against Federal reserve notes falls below forty per centum, the Federal Reserve Board shall establish a graduated tax of not more than one per centum per annum upon such deficiency until the reserves fall to thirty-two and one-half per centum, and when said reserve falls below thirty-two and one-half per centum, a tax at the rate increasingly of not less than one and one-half per centum per annum upon each two and one-half per centum or fraction thereof that such reserve falls below thirty-two and one-half per centum. The tax shall be paid by the reserve bank, but the reserve bank shall add an amount equal to said tax to the rates of interest and discount fixed by the Federal Reserve Board.

§ 139. (d) **Issuance and Retirement of Federal Reserve Notes.** — To supervise and regulate through the bureau under the charge of the Comptroller of the Currency the issue and retirement of Federal reserve notes, and to prescribe rules and regulations under which such notes may be delivered by the Comptroller to the Federal reserve agents applying therefor.

§ 140. (e) **Reserve Cities.** — To add to the number of cities classified as reserve and central reserve cities under existing law in which national banking associations are subject to the reserve requirements set forth in section twenty of this Act; or to re-classify existing reserve and central reserve cities or to terminate their designation as such.

§ 141. (f) **Suspension or Removal of Officer or Director of a Federal Reserve Bank.** — To suspend or remove any officer or director of any Federal reserve bank, the cause of such removal to be forthwith communicated in writing by the Federal Reserve Board to the removed officer or director and to said bank.

§ 142. (g) **Writing off Doubtful or Worthless Assets.** — To require the writing off of doubtful or worthless assets upon the books and balance sheets of Federal reserve banks.

§ 143. (h) **Federal Reserve Board may Suspend the Operations of any Federal Reserve Bank.** — To suspend, for the violation of any of the provisions of this Act, the operations of any Federal reserve bank, to take possession thereof, administer the same during the period of suspension, and, when deemed advisable, to liquidate or reorganize such bank.

§ 144. (i) **Requirement of Bonds from Federal Reserve Agents and Authority to make Necessary Regulations under this Act.** — To require bonds of Federal reserve agents, to make regulations for the safeguarding of all collateral, bonds, Federal reserve notes, money or property of any kind deposited in the hands of such agents, and said board shall perform the duties, functions, or services specified in this Act, and make all rules and regulations necessary to enable said board effectively to perform the same.

§ 145. (j) **General Supervision.** — To exercise general supervision over said Federal reserve banks.

§ 146. (k) **Permit to National Banks to Act as Trustee, Executor, Administrator, or Registrar of Stocks and Bonds.** — To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee,

executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe.<sup>1</sup>

§ 147. (l) **Employment of Attorneys, Clerks, etc., and Provision for Payment of Salaries.** — To employ such attorneys, experts, assistants, clerks, or other employees as may be deemed necessary to conduct the business of the board. All salaries and fees shall be fixed in advance by said board and shall be paid in the same manner as the salaries of the members of said board. All such attorneys, experts, assistants, clerks, and other employees shall be appointed without regard to the provisions of the Act of January sixteenth, eighteen hundred and eighty-three (volume twenty-two, United States Statutes at Large, page four hundred and three), and amendments thereto, or any rule or regulation made in pursuance thereof: *Provided*, That nothing herein shall prevent the President from placing said employees in the classified service.

(m) Upon the affirmative vote of not less than five of its members the Federal Reserve Board shall have power, from time to time, to permit member banks to carry in the Federal reserve banks of their respective districts any portion of their reserves now required by section nineteen of this act to be held in their own vaults.<sup>1</sup>

§ 148. (12) **Federal Advisory Council.** — There is hereby created a Federal Advisory Council, which shall consist of as many members as there are Federal reserve districts. Each Federal reserve bank by its board of directors shall annually select from its own Federal reserve district one member of said council, who shall receive such compensation and allowances as may be fixed by his board of directors subject to the approval of the Federal Reserve Board. The meetings of said advisory council shall be held at Washington, District of Columbia, at least four times each year, and oftener if called by the Federal Reserve Board. The council may in addition to the meetings above provided for hold such other meetings in Washington, District of Columbia, or elsewhere, as it may deem necessary, may select its own officers and adopt its

<sup>1</sup> § 146. By a decision in Illinois this provision has been declared not to be void as a delegation of the legislative power of Congress, but that it is unconstitutional and void on the ground that it is an attempt to confer on Congress powers which belong exclusively to the States. *People v. Brady*, 271 Ill. 100, 110 N. E. 864 (1915). See also *Fellows v. First National Bank*, 159 N. W. 335 (Mich., 1916), holding that the section is a direct violation of the sovereignty of the State.

<sup>1</sup> § 147. See § 199 E.

own methods of procedure, and a majority of its members shall constitute a quorum for the transaction of business. Vacancies in the council shall be filled by the respective reserve banks, and members selected to fill vacancies, shall serve for the unexpired term.

§ 149. **Powers of Federal Advisory Council.** — The Federal Advisory Council shall have power, by itself or through its officers, (1) to confer directly with the Federal Reserve Board on general business conditions; (2) to make oral or written representations concerning matters within the jurisdiction of said board; (3) to call for information and to make recommendations in regard to discount rates, rediscount business, note issues, reserve conditions in the various districts, the purchase and sale of gold or securities by reserve banks, open-market operations by said banks, and the general affairs of the reserve banking system.

§ 150. (13) **Powers of Federal Reserve Banks.** — Any Federal reserve bank may receive from any of its member banks, and from the United States, deposits of current funds in lawful money, national-bank notes, Federal reserve notes, or checks and drafts upon solvent member banks, payable upon presentation; or, solely for exchange purposes, may receive from other Federal reserve banks deposits of current funds in lawful money, national-bank notes, or checks and drafts upon solvent member or other Federal reserve banks, payable upon presentation.<sup>1</sup>

§ 151. **Rediscounts — Notes, Drafts, and Bills of Exchange.** — Upon the indorsement of any of its member banks, with a waiver of demand, notice and protest by such bank, any Federal reserve bank may discount notes, drafts, and bills of exchange arising out of actual commercial transactions; that is, notes, drafts, and bills of exchange issued or drawn for agricultural, industrial, or commercial purposes, or the proceeds of which have been used, or are to be used, for such purposes, the Federal Reserve Board to have the right to determine or define the character of the paper thus eligible for discount, within the meaning of this Act. Nothing in this Act contained shall be construed to prohibit such notes, drafts, and bills of exchange, secured by staple agricultural products, or other goods, wares, or merchandise from being eligible for such discount; but such definition shall not include notes, drafts, or bills covering merely investments or issued or drawn for the purpose of carrying or trading in stocks, bonds, or other

<sup>1</sup> § 150. See § 199 E.

investment securities, except bonds and notes of the Government of the United States. Notes, drafts, and bills admitted to discount under the terms of this paragraph must have a maturity at the time of discount of not more than ninety days: *Provided*, That notes, drafts, and bills drawn or issued for agricultural purposes or based on live stock and having a maturity not exceeding six months may be discounted in an amount to be limited to a percentage of the capital of the Federal reserve bank, to be ascertained and fixed by the Federal Reserve Board.<sup>1</sup>

§ 152. **Acceptances and Limitations Thereof.** — Any Federal reserve bank may discount acceptances which are based on the importation or exportation of goods and which have a maturity at time of discount of not more than three months and indorsed by at least one member bank. The amount of acceptances so discounted shall at no time exceed one-half the paid-up and unimpaired capital stock and surplus of the bank for which the rediscounts are made, except by authority of the Federal Reserve Board, under such general regulations as said board may prescribe, but not to exceed the capital stock and surplus of such bank.

The aggregate of such notes and bills bearing the signature or indorsement of any one person, company, firm, or corporation rediscounted for any one bank shall at no time exceed ten per centum of the unimpaired capital and surplus of said bank; but this restriction shall not apply to the discount of bills of exchange drawn in good faith against actually existing values.

Any member bank may accept drafts or bills of exchange drawn upon it and growing out of transactions involving the importation or exportation of goods having not more than six months' sight to run; but no bank shall accept such bills to an amount equal at any time in the aggregate to more than one-half of its paid-up and unimpaired capital stock and surplus, except by authority of the Federal Reserve Board, under such general regulations as said board may prescribe, but not to exceed the capital stock and surplus of such bank, and such regulations shall apply to all banks alike regardless of the amount of capital stock and surplus.<sup>1</sup>

§ 153. **Exceptions as to Limit of Indebtedness.** — Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows: No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time

<sup>1</sup> § 151. See § 199 E.

<sup>1</sup> § 152. See § 199 E.

actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following :

First. Notes of circulation.

Second. Moneys deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

The rediscount by any Federal reserve bank of any bills receivable and of domestic and foreign bills of exchange, and of acceptances authorized by this Act, shall be subject to such restrictions, limitations, and regulations as may be imposed by the Federal Reserve Board.<sup>1</sup>

§ 154. (14) **Open Market Operations.** —Any Federal reserve bank may, under rules and regulations prescribed by the Federal Reserve Board, purchase and sell in the open market, at home or abroad, either from or to domestic or foreign banks, firms, corporations, or individuals, cable transfers and bankers' acceptances and bills of exchange of the kinds and maturities by this Act made eligible for rediscount, with or without the indorsement of a member bank.

Every Federal reserve bank shall have power :

(a) To deal in gold coin and bullion at home or abroad, to make loans thereon, exchange Federal reserve notes for gold, gold coin, or gold certificates, and to contract for loans of gold coin or bullion, giving therefor, when necessary, acceptable security, including the hypothecation of United States bonds or other securities which Federal reserve banks are authorized to hold ;

(b) To buy and sell, at home or abroad, bonds and notes of the United States, and bills, notes, revenue bonds, and warrants with a maturity from date of purchase of not exceeding six months, issued in anticipation of the collection of taxes or in anticipation of the receipt of assured revenues by any State, county, district, political subdivision, or municipality in the continental United States, including irrigation, drainage and reclamation districts, such purchases to be made in accordance with rules and regulations prescribed by the Federal Reserve Board ;

<sup>1</sup> § 153. See § 199 E.

(c) To purchase from member banks and to sell, with or without its indorsement, bills of exchange arising out of commercial transactions, as hereinbefore defined;

(d) To establish from time to time, subject to review and determination of the Federal Reserve Board, rates of discount to be charged by the Federal reserve bank for each class of paper, which shall be fixed with a view of accommodating commerce and business;

(e) To establish accounts with other Federal reserve banks for exchange purposes and, with the consent of the Federal Reserve Board, to open and maintain banking accounts in foreign countries, appoint correspondents, and establish agencies in such countries wheresoever it may deem best for the purpose of purchasing, selling, and collecting bills of exchange, and to buy and sell with or without its indorsement, through such correspondents or agencies, bills of exchange arising out of actual commercial transactions which have not more than ninety days to run and which bear the signature of two or more responsible parties.<sup>1</sup>

§ 155. (15) **Government Deposits.** — The moneys held in the general fund of the Treasury, except the five per centum fund for the redemption of outstanding national-bank notes and the funds provided in this Act for the redemption of Federal reserve notes may, upon the direction of the Secretary of the Treasury, be deposited in Federal reserve banks, which banks, when required by the Secretary of the Treasury, shall act as fiscal agents of the United States; and the revenues of the Government or any part thereof may be deposited in such banks, and disbursements may be made by checks drawn against such deposits.

No public funds of the Philippine Islands, or of the postal savings, or any Government funds, shall be deposited in the continental United States in any bank not belonging to the system established by this Act: *Provided, however,* That nothing in this Act shall be construed to deny the right of the Secretary of the Treasury to use member banks as depositories.

#### NOTE ISSUES

§ 156. (16) **Federal Reserve Notes Authorized.** — Federal reserve notes, to be issued at the discretion of the Federal Reserve Board for the purpose of making advances to Federal reserve banks

<sup>1</sup> § 154. See § 199 E.



through the Federal reserve agents as hereinafter set forth and for no other purpose, are hereby authorized. The said notes shall be obligations of the United States and shall be receivable by all national and member banks and Federal reserve banks and for all taxes, customs, and other public dues. They shall be redeemed in gold on demand at the Treasury Department of the United States, in the city of Washington, District of Columbia, or in gold or lawful money at any Federal reserve bank.

**§ 157. Applications for Federal Reserve Notes.** — Any Federal reserve bank may make application to the local Federal reserve agent for such amount of the Federal reserve notes hereinbefore provided for as it may require. Such application shall be accompanied with a tender to the local Federal reserve agent of collateral in amount equal to the sum of the Federal reserve notes thus applied for and issued pursuant to such application. The collateral security thus offered shall be notes and bills, accepted for rediscount under the provisions of section thirteen of this Act, and the Federal reserve agent shall each day notify the Federal Reserve Board of all issues and withdrawals of Federal reserve notes to and by the Federal reserve bank to which he is accredited. The said Federal Reserve Board may at any time call upon a Federal reserve bank for additional security to protect the Federal reserve notes issued to it.<sup>1</sup>

**§ 158. Reserve Requirements for Federal Reserve Banks.** — Every Federal reserve bank shall maintain reserves in gold or lawful money of not less than thirty-five per centum against its deposits and reserves in gold of not less than forty per centum against its Federal reserve notes in actual circulation, and not offset by gold or lawful money deposited with the Federal reserve agent.

**§ 159. Issuance and Redemption of Federal Reserve Notes.** **No Federal Reserve Bank permitted to pay out Notes issued through another Federal Reserve Bank.** — Notes so paid out shall bear upon their faces a distinctive letter and serial number, which shall be assigned by the Federal Reserve Board to each Federal reserve bank. Whenever Federal reserve notes issued through one Federal reserve bank shall be received by another Federal reserve bank they shall be promptly returned for credit or redemption to the Federal reserve bank through which they were originally issued. No Federal reserve bank shall pay out notes issued through another under penalty of a tax of ten per centum upon

<sup>1</sup> § 157. See § 199 E.

the face value of notes so paid out. Notes presented for redemption at the Treasury of the United States shall be paid out of the redemption fund and returned to the Federal reserve banks through which they were originally issued, and thereupon such Federal reserve bank shall, upon demand of the Secretary of the Treasury, reimburse such redemption fund in lawful money or, if such Federal reserve notes have been redeemed by the Treasurer in gold or gold certificates, then such funds shall be reimbursed to the extent deemed necessary by the Secretary of the Treasury in gold or gold certificates, and such Federal reserve bank shall, so long as any of its Federal reserve notes remain outstanding, maintain with the Treasurer in gold an amount sufficient in the judgment of the Secretary to provide for all redemptions to be made by the Treasurer. Federal reserve notes received by the Treasury, otherwise than for redemption, may be exchanged for gold out of the redemption fund hereinafter provided and returned to the reserve bank through which they were originally issued, or they may be returned to such bank for the credit of the United States. Federal reserve notes unfit for circulation shall be returned by the Federal reserve agents to the Comptroller of the Currency for cancellation and destruction.

**§ 160. Deposits of Gold with Treasurer for Redemption of Federal Reserve Notes.**— The Federal Reserve Board shall require each Federal reserve bank to maintain on deposit in the Treasury of the United States a sum in gold sufficient in the judgment of the Secretary of the Treasury for the redemption of the Federal reserve notes issued to such bank, but in no event less than five per centum; but such deposit of gold shall be counted and included as part of the forty per centum reserve hereinbefore required.

**§ 161. Federal Reserve Board may Grant or Reject Application of Federal Reserve Bank for Federal Reserve Notes. Federal Reserve Notes First Lien on all the Assets of the Bank.**— The board shall have the right, acting through the Federal reserve agent, to grant in whole or in part or to reject entirely the application of any Federal reserve bank for Federal reserve notes; but to the extent that such application may be granted the Federal Reserve Board shall, through its local Federal reserve agent, supply Federal reserve notes to the bank so applying, and such bank shall be charged with the amount of such notes and shall pay such rate of interest on said amount as may be established

by the Federal Reserve Board, and the amount of such Federal reserve notes so issued to any such bank shall, upon delivery, together with such notes of such Federal reserve bank as may be issued under section eighteen of this Act upon security of United States two per centum Government bonds, become a first and paramount lien on all the assets of such bank.

**§ 162. Reduction of Note Issues.** — Any Federal reserve bank may at any time reduce its liability for outstanding Federal reserve notes by depositing, with the Federal reserve agent, its Federal reserve notes, gold, gold certificates, or lawful money of the United States. Federal reserve notes so deposited shall not be reissued, except upon compliance with the conditions of an original issue.

The Federal reserve agent shall hold such gold, gold certificates, or lawful money available exclusively for exchange for the outstanding Federal reserve notes when offered by the reserve bank of which he is a director. Upon the request of the Secretary of the Treasury the Federal Reserve Board shall require the Federal reserve agent to transmit so much of said gold to the Treasury of the United States as may be required for the exclusive purpose of the redemption of such notes.

**§ 163. Substitution of Collateral.** — Any Federal reserve bank may at its discretion withdraw collateral deposited with the local Federal reserve agent for the protection of its Federal reserve notes deposited with it and shall at the same time substitute therefor other like collateral of equal amount with the approval of the Federal reserve agent under regulations to be prescribed by the Federal Reserve Board.

**§ 164. Preparation of Federal Reserve Notes. Plates and Dies to be Under Control of Comptroller of Currency. Where Notes are to be Deposited.** — In order to furnish suitable notes for circulation as Federal reserve notes, the Comptroller of the Currency shall, under the direction of the Secretary of the Treasury, cause plates and dies to be engraved in the best manner to guard against counterfeits and fraudulent alterations, and shall have printed therefrom and numbered such quantities of such notes of the denominations of \$5, \$10, \$20, \$50, \$100, as may be required to supply the Federal Reserve banks. Such notes shall be in form and tenor as directed by the Secretary of the Treasury under the provisions of this Act and shall bear the distinctive numbers of the several Federal reserve banks through which they are issued.

When such notes have been prepared, they shall be deposited in the Treasury, or in the subtreasury or mint of the United States nearest the place of business of each Federal reserve bank and shall be held for the use of such bank subject to the order of the Comptroller of the Currency for their delivery, as provided by this Act.

The plates and dies to be procured by the Comptroller of the Currency for the printing of such circulating notes shall remain under his control and direction, and the expenses necessarily incurred in executing the laws relating to the procuring of such notes, and all other expenses incidental to their issue and retirement, shall be paid by the Federal reserve banks, and the Federal Reserve Board shall include in its estimate of expenses levied against the Federal reserve banks a sufficient amount to cover the expenses herein provided for.

The examination of plates, dies, bed pieces, and so forth, and regulations relating to such examination of plates, dies, and so forth, of national-bank notes provided for in section fifty-one hundred and seventy-four Revised Statutes, is hereby extended to include notes herein provided for.

**§ 165. Appropriation for Expense of Printing National-Bank Notes may be used for Printing Federal Reserve Notes.**—Any appropriation heretofore made out of the general funds of the Treasury for engraving plates and dies, the purchase of distinctive paper, or to cover any other expense in connection with the printing of national-bank notes or notes provided for by the Act of May thirtieth, nineteen hundred and eight, and any distinctive paper that may be on hand at the time of the passage of this Act may be used in the discretion of the Secretary for the purposes of this Act, and should the appropriations heretofore made be insufficient to meet the requirements of this Act in addition to circulating notes provided for by existing law, the Secretary is hereby authorized to use so much of any funds in the Treasury not otherwise appropriated for the purpose of furnishing the notes aforesaid: *Provided, however,* That nothing in this section contained shall be construed as exempting national banks or Federal reserve banks from their liability to reimburse the United States for any expenses incurred in printing and issuing circulating notes.

**§ 166. When Federal Reserve Bank shall Receive Checks and Drafts on Deposit at Par.**—Every Federal reserve bank shall receive on deposit at par from member banks or from Federal reserve banks checks and drafts drawn upon any of its depositors,

and when remitted by a Federal reserve bank, checks and drafts drawn by any depositor in any other Federal reserve bank or member bank upon funds to the credit of said depositor in said reserve bank or member bank.

§ 167. **Charges for Collection and for Sale of Exchange.** — Nothing herein contained shall be construed as prohibiting a member bank from charging its actual expense incurred in collecting and remitting funds, or for exchange sold to its patrons. The Federal Reserve Board shall, by rule, fix the charges to be collected by the member banks from its patrons whose checks are cleared through the Federal reserve bank and the charge which may be imposed for the service of clearing or collection rendered by the Federal reserve bank.

The Federal Reserve Board shall make and promulgate from time to time regulations governing the transfer of funds and charges therefor among Federal reserve banks and their branches, and may at its discretion exercise the functions of a clearing house for such Federal reserve banks, or may designate a Federal reserve bank to exercise such functions, and may also require each such bank to exercise the functions of a clearing house for its member banks.

§ 168. (17) **National Banks not Required to make Deposit of United States Bonds Prior to Commencement of Business.** — So much of the provisions of section fifty-one hundred and fifty-nine of the Revised Statutes of the United States, and section four of the Act of June twentieth, eighteen hundred and seventy-four, and section eight of the Act of July twelfth, eighteen hundred and eighty-two, and of any other provisions of existing statutes as require that before any national banking association shall be authorized to commence banking business it shall transfer and deliver to the Treasurer of the United States a stated amount of United States registered bonds is hereby repealed.

§ 169. (18) **Refunding Bonds. Retirement of Circulating Notes.** — After two years from the passage of this Act, and at any time during a period of twenty years thereafter, any member bank desiring to retire the whole or any part of its circulating notes, may file with the Treasurer of the United States an application to sell for its account, at par and accrued interest, United States bonds securing circulation to be retired.

§ 170. **Purchase of United States Bonds by Federal Reserve Banks.** — The Treasurer shall, at the end of each quarterly period, furnish the Federal Reserve Board with a list of such applications,

and the Federal Reserve Board may, in its discretion, require the Federal reserve banks to purchase such bonds from the banks whose applications have been filed with the Treasurer at least ten days before the end of any quarterly period at which the Federal Reserve Board may direct the purchase to be made: *Provided*, That Federal reserve banks shall not be permitted to purchase an amount to exceed \$25,000,000 of such bonds in any one year, and which amount shall include bonds acquired under section four of this Act by the Federal reserve bank.

*Provided further*, That the Federal Reserve Board shall allot to each Federal reserve bank such proportion of such bonds as the capital and surplus of such bank shall bear to the aggregate capital and surplus of all the Federal reserve banks.

Upon notice from the Treasurer of the amount of bonds so sold for its account, each member bank shall duly assign and transfer, in writing, such bonds to the Federal reserve bank purchasing the same, and such Federal reserve bank shall, thereupon, deposit lawful money with the Treasurer of the United States for the purchase price of such bonds, and the Treasurer shall pay to the member bank selling such bonds any balance due after deducting a sufficient sum to redeem its outstanding notes secured by such bonds, which notes shall be canceled and permanently retired when redeemed.

**§ 171. Issue of Circulating Notes to Federal Reserve Banks on Security of United States Bonds. Circulating Notes so Issued Obligations of Federal Reserve Bank.**—The Federal reserve banks purchasing such bonds shall be permitted to take out an amount of circulating notes equal to the par value of such bonds.

Upon the deposit with the Treasurer of the United States of bonds so purchased, or any bonds with the circulating privilege acquired under section four of this Act, any Federal reserve bank making such deposit in the manner provided by existing law, shall be entitled to receive from the Comptroller of the Currency circulating notes in blank, registered and countersigned as provided by law, equal in amount to the par value of the bonds so deposited. Such notes shall be the obligations of the Federal reserve bank procuring the same, and shall be in form prescribed by the Secretary of the Treasury, and to the same tenor and effect as national-bank notes now provided by law. They shall be issued and redeemed under the same terms and conditions as national-bank notes except that they shall not be limited to

the amount of the capital stock of the Federal reserve bank issuing them.

§ 172. **Issue of Gold Notes of the United States in Exchange for Certain United States Bonds.** — Upon application of any Federal reserve bank, approved by the Federal Reserve Board, the Secretary of the Treasury may issue, in exchange for United States two per centum gold bonds bearing the circulation privilege, but against which no circulation is outstanding, one-year gold notes of the United States without the circulation privilege, to an amount not to exceed one-half of the two per centum bonds so tendered for exchange, and thirty-year three per centum gold bonds without the circulation privileged for the remainder of the two per centum bonds so tendered: *Provided*, That at the time of such exchange the Federal reserve bank obtaining such one-year gold notes shall enter into an obligation with the Secretary of the Treasury binding itself to purchase from the United States for gold at the maturity of such one-year notes, an amount equal to those delivered in exchange for such bonds, if so requested by the Secretary, and at each maturity of one-year notes so purchased by such Federal reserve bank, to purchase from the United States such an amount of one-year notes as the Secretary may tender to such bank, not to exceed the amount issued to such bank in the first instance, in exchange for the two per centum United States gold bonds; said obligation to purchase at maturity such notes shall continue in force for a period not to exceed thirty years.

For the purpose of making the exchange herein provided for, the Secretary of the Treasury is authorized to issue at par Treasury notes in coupon or registered form as he may prescribe in denominations of one hundred dollars, or any multiple thereof, bearing interest at the rate of three per centum per annum, payable quarterly, such Treasury notes to be payable not more than one year from the date of their issue in gold coin of the present standard value, and to be exempt as to principal and interest from the payment of all taxes and duties of the United States except as provided by this Act, as well as from taxes in any form by or under State, municipal, or local authorities. And for the same purpose, the Secretary is authorized and empowered to issue United States gold bonds at par, bearing three per centum interest payable thirty years from date of issue, such bonds to be of the same general tenor and effect and to be issued under the same general

terms and conditions as the United States three per centum bonds without the circulation privilege now issued and outstanding.

Upon application of any Federal reserve bank, approved by the Federal Reserve Board, the Secretary may issue at par such three per centum bonds in exchange for the one-year gold notes herein provided for.

#### BANK RESERVES

§ 173. (19) **Demand and Time Deposits Defined.** — Demand deposits within the meaning of this Act shall comprise all deposits payable within thirty days, and time deposits shall comprise all deposits payable after thirty days, and all savings accounts and certificates of deposit which are subject to not less than thirty days' notice before payment.

§ 174. **Reserve Requirements — When Effective.** — When the Secretary of the Treasury shall have officially announced, in such manner as he may elect, the establishment of a Federal reserve bank in any district, every subscribing member bank shall establish and maintain reserves as follows:

§ 175. (a) **Reserve Requirements for Banks not in Reserve Cities.** — A bank not in a reserve or central reserve city as now or hereafter defined shall hold and maintain reserves equal to twelve per centum of the aggregate amount of its demand deposits and five per centum of its time deposits, as follows:

In its vaults for a period of thirty-six months after said date five-twelfths thereof and permanently thereafter four-twelfths.

In the Federal reserve bank of its district, for a period of twelve months after said date, two-twelfths, and for each succeeding six months an additional one-twelfth, until five-twelfths have been so deposited, which shall be the amount permanently required.

For a period of thirty-six months after said date the balance of the reserves may be held in its own vaults, or in the Federal reserve bank, or in national banks in reserve or central reserve cities as now defined by law.

After said thirty-six months' period said reserves, other than those hereinbefore to be held in the vaults of the member bank and in the Federal reserve bank, shall be held in the vaults of the member bank or in the Federal reserve bank, or in both, at the option of the member bank.

§ 176. (b) **Reserve Requirements for Banks in Reserve Cities.** — A bank in a reserve city, as now or hereafter defined, shall



hold and maintain reserves equal to fifteen per centum of the aggregate amount of its demand deposits and five per centum of its time deposits, as follows :

In its vaults for a period of thirty-six months after said date, six-fifteenths thereof, and permanently thereafter five-fifteenths.

In the Federal reserve bank of its district for a period of twelve months after the date aforesaid, at least three-fifteenths, and for each succeeding six months an additional one-fifteenth, until six-fifteenths have been so deposited, which shall be the amount permanently required.

For a period of thirty-six months after said date the balance of the reserves may be held in its own vaults, or in the Federal reserve bank, or in national banks in central reserve cities, as now defined by law.

After said thirty-six months' period all of said reserves, except those hereinbefore required to be held permanently in the vaults of the member bank and in the Federal reserve bank, shall be held in its vaults or in the Federal reserve bank or in both, at the option of the member bank.

**§ 177. (c) Reserve Requirements for Banks in Central Reserve Cities.** — A bank in a central reserve city, as now or hereafter defined, shall hold and maintain a reserve equal to eighteen per centum of the aggregate amount of its demand deposits and five per centum of its time deposits, as follows :

In its vaults, six-eighteenths thereof.

In the Federal reserve bank, seven-eighteenths.

The balance of said reserves shall be held in its own vaults or in the Federal reserve bank, at its option.

**§ 178. Federal Reserve Bank may Receive from Member Bank Eligible Paper as Reserve — Amount not to Exceed One-half of Each Instalment.** — Any Federal reserve bank may receive from the member banks as reserves not exceeding one-half of each instalment, eligible paper as described in section thirteen properly indorsed and acceptable to the said reserve bank.

**§ 179. Reserve Requirements for State Banks and Trust Companies.** — If a State bank or trust company is required or permitted by the law of its State to keep its reserves either in its own vaults or with another State bank or trust company or with a national bank, such reserve deposits so kept in such State bank, trust company, or national bank shall be construed within the meaning of this section as if they were reserve deposits in a national

bank in a reserve or central reserve city for a period of three years after the Secretary of the Treasury shall have officially announced the establishment of a Federal reserve bank in the district in which such State bank or trust company is situate.

§ 180. **Member Bank Forbidden to Keep on Deposit with Nonmember Bank a Sum in Excess of Ten per Cent of its Own Capital and Surplus or to Secure Discounts for Nonmember Bank.** — Except as thus provided, no member bank shall keep on deposit with any nonmember bank a sum in excess of ten per centum of its own paid-up capital and surplus. No member bank shall act as the medium or agent of a nonmember bank in applying for or receiving discounts from a Federal reserve bank under the provisions of this Act except by permission of the Federal Reserve Board.

§ 181. **Withdrawal of Reserve by Member Bank.** — The reserve carried by a member bank with a Federal reserve bank may, under the regulations and subject to such penalties as may be prescribed by the Federal Reserve Board, be checked against and withdrawn by such member bank for the purpose of meeting existing liabilities: *Provided, however,* That no bank shall at any time make new loans or shall pay any dividends unless and until the total reserve required by law is fully restored.

§ 182. **Reserve Requirement — How Estimated.** — In estimating the reserves required by this Act, the net balance of amounts due to and from other banks shall be taken as the basis for ascertaining the bank deposits against which reserves shall be determined. Balances in reserve banks due to member banks shall, to the extent herein provided, be counted as reserves.

§ 183. **Reserve Requirements for National Banks Located in Alaska or Outside the Continental United States.** — National banks located in Alaska or outside the continental United States may remain nonmember banks, and shall in that event maintain reserves and comply with all the conditions now provided by law regulating them; or said banks, except in the Philippine Islands, may, with the consent of the Reserve Board, become member banks of any one of the reserve districts, and shall, in that event, take stock, maintain reserves, and be subject to all the other provisions of this Act.

§ 184. (20) **Redemption Fund with Treasurer not to be Counted as Reserve.** — So much of sections two and three of the Act of June twentieth, eighteen hundred and seventy-four, entitled "An

Act fixing the amount of United States notes, providing for a redistribution of the national-bank currency, and for other purposes", as provides that the fund deposited by any national banking association with the Treasurer of the United States for the redemption of its notes shall be counted as a part of its lawful reserve as provided in the Act aforesaid, is hereby repealed. And from and after the passage of this Act such fund of five per centum shall in no case be counted by any national banking association as a part of its lawful reserve.

#### BANK EXAMINATIONS

§ 185. (21) **Appointment and Powers of Examiners — Acceptance of Reports of Examinations by State Authority.** — Section fifty-two hundred and forty, United States Revised Statutes, is amended to read as follows :

The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall appoint examiners who shall examine every member bank at least twice in each calendar year and oftener if considered necessary: *Provided, however,* That the Federal Reserve Board may authorize examination by the State authorities to be accepted in the case of State banks and trust companies and may at any time direct the holding of a special examination of State banks or trust companies that are stockholders in any Federal reserve bank. The examiner making the examination of any national bank, or of any other member bank, shall have power to make a thorough examination of all the affairs of the bank and in doing so he shall have power to administer oaths and to examine any of the officers and agents thereof under oath and shall make a full and detailed report of the condition of said bank to the Comptroller of the Currency.

§ 186. **Salaries of Bank Examiners.** — The Federal Reserve Board, upon the recommendation of the Comptroller of the Currency, shall fix the salaries of all bank examiners and make report thereof to Congress. The expense of the examinations herein provided for shall be assessed by the Comptroller of the Currency upon the banks examined in proportion to assets or resources held by the banks upon the dates of examination of the various banks.

§ 187. **Examinations by Federal Reserve Bank.** — In addition to the examinations made and conducted by the Comptroller of the Currency, every Federal reserve bank may, with the approval

of the Federal reserve agent or the Federal Reserve Board, provide for special examination of member banks within its district. The expense of such examinations shall be borne by the bank examined. Such examinations shall be so conducted as to inform the Federal reserve bank of the condition of its member banks and of the lines of credit which are being extended by them. Every Federal reserve bank shall at all times furnish to the Federal Reserve Board such information as may be demanded concerning the condition of any member bank within the district of the said Federal reserve bank.

No bank shall be subject to any visitatorial powers other than such as are authorized by law, or vested in the courts of justice or such as shall be or shall have been exercised or directed by Congress, or by either House thereof or by any committee of Congress or of either House duly authorized.

§ 188. **Examinations of Federal Reserve Banks.** — The Federal Reserve Board shall, at least once each year, order an examination of each Federal reserve bank, and upon joint application of ten member banks the Federal Reserve Board shall order a special examination and report of the condition of any Federal reserve bank.

§ 189. (22) **Loans and Gratuities to Bank Examiners Forbidden. National Bank Examiners not Permitted to Perform any Other Service for Compensation while Holding such Office for any Bank or Officer or Employee Thereof.** — No member bank or any officer, director, or employee thereof shall hereafter make any loan or grant any gratuity to any bank examiner. Any bank officer, director, or employee violating this provision shall be deemed guilty of a misdemeanor and shall be imprisoned not exceeding one year or fined not more than \$5000 or both; and may be fined a further sum equal to the money so loaned or gratuity given. Any examiner accepting a loan or gratuity from any bank examined by him or from an officer, director, or employee thereof shall be deemed guilty of a misdemeanor and shall be imprisoned not exceeding one year or fined not more than \$5000, or both; and may be fined a further sum equal to the money so loaned or gratuity given; and shall forever thereafter be disqualified from holding office as a national bank examiner. No national-bank examiner shall perform any other service for compensation while holding such office for any bank or officer, director, or employee thereof.

**§ 190. Officers or Employees not Permitted to Receive any Fee or Other Consideration in Connection with any Business of the Bank other than the Salary of the Director's Fee. Examiner Forbidden to Disclose the Names of Borrowers or the Collateral for Loans to other than the Proper Officers.** — Other than the usual salary or director's fee paid to any officer, director, or employee of a member bank and other than a reasonable fee paid by said bank to such officer, director, or employee for services rendered to such bank, no officer, director, employee, or attorney of a member bank shall be a beneficiary of or receive, directly or indirectly, any fee, commission, gift, or other consideration for or in connection with any transaction or business of the bank. No examiner, public or private, shall disclose the names of borrowers or the collateral for loans of a member bank to other than the proper officers of such bank without first having obtained the express permission in writing from the Comptroller of the Currency, or from the board of directors of such bank, except when ordered to do so by a court of competent jurisdiction, or by direction of the Congress of the United States, or of either House thereof, or any committee of Congress or of either House duly authorized. Any person violating any provision of this section shall be punished by a fine of not exceeding \$5000 or by imprisonment not exceeding one year, or both.

Except as provided in existing laws, this provision shall not take effect until sixty days after the passage of this Act.

**§ 191. (23) Liability of Stockholders of National Banks.** — The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure.

**§ 192. (24) Loans on Farm Lands.** — Any national banking association not situated in a central reserve city may make loans

secured by improved and unencumbered farm land, situated within its Federal reserve district, but no such loans shall be made for a longer time than five years, nor for an amount exceeding fifty per centum of the actual value of the property offered as security. Any such bank may make such loans in an aggregate sum equal to twenty-five per centum of its capital and surplus or to one-third of its time deposits and such banks may continue hereafter as heretofore to receive time deposits and to pay interest on the same.

The Federal Reserve Board shall have power from time to time to add to the list of cities in which national banks shall not be permitted to make loans secured upon real estate in the manner described in this section.<sup>1</sup>

§ 193. (25) **Foreign Branches.** — Any national banking association possessing a capital and surplus of \$1,000,000 or more may file application with the Federal Reserve Board, upon such conditions and under such regulations as may be prescribed by the said board, for the purpose of securing authority to establish branches in foreign countries or dependencies of the United States for the furtherance of the foreign commerce of the United States, and to act, if required to do so, as fiscal agents of the United States. Such application shall specify, in addition to the name and capital of the banking association filing it, the place or places where the banking operations proposed are to be carried on, and the amount of capital set aside for the conduct of its foreign business. The Federal Reserve Board shall have power to approve or to reject such application if, in its judgment, the amount of capital proposed to be set aside for the conduct of foreign business is inadequate, or if for other reasons the granting of such application is deemed inexpedient.<sup>1</sup>

Every national banking association which shall receive authority to establish foreign branches shall be required at all times to furnish information concerning the condition of such branches to the Comptroller of the Currency upon demand, and the Federal Reserve Board may order special examinations of the said foreign branches at such time or times as it may deem best. Every such national banking association shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office, and shall at the end of each fiscal period

<sup>1</sup> § 192. See § 199 E.

transfer to its general ledger the profit or loss accruing at each branch as a separate item.<sup>1</sup>

§ 194. (26) **Repeal of Provisions of Law Inconsistent with the Provisions of the Federal Reserve Act.** — All provisions of law inconsistent with or superseded by any of the provisions of this Act are to that extent and to that extent only hereby repealed: *Provided*, Nothing in this Act contained shall be construed to repeal the parity provision or provisions contained in an Act approved March fourteenth, nineteen hundred, entitled "An Act to define and fix the standard of value, to maintain the parity of all forms of money issued or coined by the United States, to refund the public debt, and for other purposes", and the Secretary of the Treasury may for the purpose of maintaining such parity and to strengthen the gold reserve, borrow gold on the security of United States bonds authorized by section two of the Act last referred to or for one-year gold notes bearing interest at a rate of not to exceed three per centum per annum, or sell the same if necessary to obtain gold. When the funds of the Treasury on hand justify, he may purchase and retire such outstanding bonds and notes.

§ 195. (27) **Act of May 30, 1908, Extended to June 30, 1915. Reenactment of Certain Sections of Revised Statutes.** — The provisions of the Act of May thirtieth, nineteen hundred and eight, authorizing national currency associations, the issue of additional national-bank circulation, and creating a National Monetary Commission, which expires by limitation under the terms of such Act on the thirtieth day of June, nineteen hundred and fourteen, are hereby extended to June thirtieth, nineteen hundred and fifteen, and sections fifty-one hundred and fifty-three, fifty-one hundred and seventy-two, fifty-one hundred and ninety-one, and fifty-two hundred and fourteen of the Revised Statutes of the United States, which were amended by the Act of May thirtieth, nineteen hundred and eight, are hereby reenacted to read as such sections read prior to May thirtieth, nineteen hundred and eight, subject to such amendments or modifications as are prescribed in this Act:<sup>1</sup>

§ 196. **Rate of Taxation on Circulating Notes Secured otherwise than by Bonds of the United States. When Secretary of Treasury Authorized to Suspend Limitations of Act of May 30, 1908.** — *Provided, however*, That section nine of the Act first re-

<sup>1</sup> § 193. See § 199 E.

<sup>1</sup> § 195. See § 199 A.

ferred to in this section is hereby amended so as to change the tax rates fixed in said Act by making the portion applicable thereto read as follows:

“National banking associations having circulating notes secured otherwise than by bonds of the United States, shall pay for the first three months a tax at the rate of three per centum per annum upon the average amount of such of their notes in circulation as are based upon the deposit of such securities, and afterwards an additional tax rate of one-half of one per centum per annum for each month until a tax of six per centum per annum is reached, and thereafter such tax of six per centum per annum upon the average amount of such notes: *Provided further*, That whenever in his judgment he may deem it desirable, the Secretary of the Treasury shall have power to suspend the limitations imposed by section one and section three of the Act referred to in this section, which prescribe that such additional circulation secured otherwise than by bonds of the United States shall be issued only to National banks having circulating notes outstanding secured by the deposit of bonds of the United States to an amount not less than forty per centum of the capital stock of such banks, and to suspend also the conditions and limitations of section five of said Act except that no bank shall be permitted to issue circulating notes in excess of one hundred and twenty-five per centum of its unimpaired capital and surplus. He shall require each bank and currency association to maintain on deposit in the Treasury of the United States a sum in gold sufficient in his judgment for the redemption of such notes, but in no event less than five per centum. He may permit National banks, during the period for which such provisions are suspended, to issue additional circulation under the terms and conditions of the Act referred to as herein amended: *Provided further*, That the Secretary of the Treasury, in his discretion, is further authorized to extend the benefits of this Act to all qualified State banks and trust companies, which have joined the Federal reserve system, or which may contract to join within fifteen days after the passage of this Act.”

§ 197. (28) **Reduction of Capital of National Banks.** — Section fifty-one hundred and forty-three of the Revised Statutes is hereby amended and reenacted to read as follows: Any association formed under this title may, by the vote of shareholders owning two-thirds of its capital stock, reduce its capital to any sum not below the



amount required by this title to authorize the formation of associations; but no such reduction shall be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and such reduction has been approved by the said Comptroller of the Currency and by the Federal Reserve Board, or by the organization committee pending the organization of the Federal Reserve Board.

§ 198. (29) **Invalidation of Clause, etc., in Act Not to Invalidate Remainder of Act.** — If any clause, sentence, paragraph, or part of this Act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

§ 199. (30) **Reservation of Right to Amend or Repeal.** — The right to amend, alter, or repeal this Act is hereby expressly reserved.

## CASES

[The decisions which have been rendered in construing the provisions of the national banking acts are naturally disconnected in character, and are constantly at variance with each other. It has therefore been deemed best to give them in the shape of a digest.]

§ 200. **National Banks are Instruments of the National Government.**<sup>o</sup> — It has been said, generally, concerning the national banking associations, organized under the acts of Congress of 1863 and 1864, that these banks “are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them, Congress is the sole judge. Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see

<sup>o</sup> § 200. And they are under the paramount authority of the United States. *State v. Clement National Bank*, 84 Vt. 167, 78 Atl. 944, 1912D Ann. Cas. 22, n. See also *Roberts v. Tifton National Bank*, 10 Ga. App. 272, 73 S. E. 407 (1912); *Hansford v. Tifton National Bank*, 10 Ga. App. 270, 73 S. E. 405 (1912).

proper to permit.”<sup>aa</sup> Anything beyond this is “an abuse, because it is the usurpation of power which a single State cannot give.” Against the national will, “the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers invested in the general government.”<sup>1</sup>

Where by State statute the establishment of banking companies without legislative authority is prohibited, such provision does not apply to national banks, which are created by act of Congress, and are independent of State legislation.<sup>2</sup>

(a) **Consequent Presumptions of Knowledge, inter sese.**—Inasmuch as all the national banks are organized under precisely the same statutes, and are regulated and governed in every respect by the same enactments, it has been held that in all dealings between such associations the officers and agents of each must be assumed to be familiar with the corporate powers of the other, and with the general powers and duties of the several officers of the other.<sup>3</sup>

§ 201. **The Comptroller.**<sup>1</sup>—(a) The Comptroller can remove a receiver appointed by him.<sup>2</sup> His certificate, approved by the

<sup>aa</sup> But national banks are exempt from State control only so far as it impairs their efficiency in performing the functions of their agency. *State v. Clement National Bank*, *supra*. See also *Guthrie v. Harkness*, 199 U. S. 148, 50 L. ed. 130, 26 Sup. Ct. 4 (1905), affirming 27 Utah 248, 75 Pac. 624, 107 Am. St. Rep. 664; *First National Bank v. Commonwealth*, 143 Ky. 816, 137 S. W. 518, 1912D Ann. Cas. 378, 34 L. R. A. (N. S.) 54; *Merchants' National Bank v. Ford*, 124 Ky. 403, 99 S. W. 260 (1907); *Green v. Bennett*, 110 S. W. 108 (Tex. Civ. App.) (1908); *State v. People's National Bank*, 75 N. H. 27, 70 Atl. 542 (1910).

<sup>1</sup> *Farmers & Mechanics' National Bank v. Dearing*, 91 U. S. 29, 23 L. ed. 196; and see *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. ed. 482; *Easton v. Iowa*, 188 U. S. 220, 47 L. ed. 452, 23 Sup. Ct. 288 (1902); *Van Reed v. People's National Bank*, 198 U. S. 554, 49 L. ed. 1161, 25 Sup. Ct. 775 (1905); *Christopher v. Norvell*, 201 U. S. 216, 50 L. ed. 732, 26 Sup. Ct. 502 (1906); *State v. Clement National Bank*, 84 Vt. 167, 78 Atl. 944, 1912D Ann. Cas. 22, n.; *Old National Bank v. State*, 58 W. Va. 559, 52 S. E. 494, 3 L. R. A. (N. S.) 584, n. (1905); *People v. Brady*, 271 Ill. 100, 110 N. E. 864 (1915); *Boyd v. Schneider*, 124 Fed. 239 (1903).

A guaranty law passed by a State favoring State banks and prohibiting national banks from accepting the provisions of the act, thus impairing their efficiency and interfering by competition with their legitimate business is indirect and incidental and so not unconstitutional and void. *Dolley v. Abilene National Bank*, 179 Fed. 461 (1910), overruling *Larabee v. Dolley*, 175 Fed. 365 (1910).

<sup>2</sup> *Stetson v. City of Bangor*, 56 Me. 274.

<sup>3</sup> *First National Bank v. Ocean National Bank*, 60 N. Y. 278.

<sup>1</sup> § 201. R. S. 324–333. See §§ 1, 2, 3, 206 a.

<sup>2</sup> *Cadle v. Baker*, 20 Wall. 650, 22 L. ed. 448.

Secretary of the Treasury, reciting the existence of the facts necessary to give him power to appoint a receiver, is sufficient evidence of the receiver's appointment in an action brought by him.<sup>3</sup>

(b) It is doubtful whether it is within the competency of the Comptroller to submit himself, in the exercise of duties specially confided to him by acts of Congress, to the control of the courts,<sup>3a</sup> and especially of those which can assert no such jurisdiction by reason of their territorial limits. But he has no authority to subject the United States to such jurisdiction, and to submit the rights of the government to litigation in any court, without some provision of law authorizing him to do so. Where the liability of the United States for demands is denied, or payment refused, the Court of Claims has jurisdiction, and no other court has. The United States cannot be subjected to litigation growing out of its relations to national banks in all the various courts in which their affairs may be the subject of judicial controversy.<sup>4</sup>

§ 202. **Evidence, Comptroller.**<sup>1</sup> — A copy of the certificate of organization of a national bank, certified by the Comptroller and authenticated by his seal, is competent evidence in a State court.<sup>2</sup>

§ 205. **Organization, Statutes.** — National banks can be organized only under provisions of the acts of Congress.<sup>1</sup>

§ 206. **Organization Certificate.**<sup>1</sup> — Until the "organization certificate" has been made in compliance with the requirements of section 6, there can be no legal organization of the association.<sup>1a</sup> Persons who fail to unite in such certificate, by setting their signatures thereto, are not members of the association.<sup>2</sup>

<sup>3</sup> *Platt v. Beebe*, 57 N. Y. 339; *Méchants' Ex. National Bank v. Cardozo*, 3 Jones & S. (N. Y.) 162.

<sup>3a</sup> The courts cannot review his acts in the exercise of his power of control and visitation. *First National Bank v. Murray*, 212 Fed. 140 (1914). And some of his decisions are binding on the court. *Thomas v. Gilbert*, 55 Or. 14, 101 Pac. 393, 104 Pac. 888, 1912A Ann. Cas. 516.

<sup>4</sup> *Case v. Terrell*, 11 Wall. 199, 20 L. ed. 134.

<sup>1</sup> § 202. R. S. 884. See §§ 2, 6, 201, 206 *a*.

<sup>2</sup> *Tapley v. Martin*, 116 Mass. 275; *First National Bank v. Kidd*, 20 Minn. 234.

<sup>1</sup> § 205. *First National Bank v. Murray*, 212 Fed. 140 (1914); *Weinhard v. Commercial National Bank*, 41 Or. 359, 68 Pac. 806 (1902); *Bailey v. Farmers' National Bank*, 97 Ill. App. 66.

<sup>1</sup> § 206. R. S. 5134. See §§ 6, 202, 206 *a*.

<sup>1a</sup> There can be no right to carry on the business of a national bank except upon the conditions and in the way prescribed by the laws of Congress regulating national banks, of which all must take notice. *First National Bank v. Murray*, 212 Fed. 140 (1914).

<sup>2</sup> *Burrows v. Smith*, 10 N. Y. 550.

A national bank is a citizen of the State in which by law it is located. The designation of its place of business in the certificate of organization determines its locality, and it can have no other.<sup>3</sup>

(a) **Allegation, Denial, and Proof of Corporate Character.** — **The Comptroller's Certificate.**<sup>4</sup> — That the plaintiff, suing in the corporate character of a national banking association, existing and organized under and by virtue of the act of Congress, is not legally such, and therefore is not entitled to maintain a suit as such, by reason of having failed to comply with the exact requirements of the act, is a matter which the defendant may fairly plead. But it cannot be tried by affidavit, on motion.<sup>5</sup>

On the other hand, however, it has been very properly held that it is for the Comptroller of the Currency to decide whether a national bank has complied with the act of Congress before he issues his certificate, and that his decision is not subject to the revision of a State court. Therefore, after the certificate has passed through the hands of the Comptroller, no objection can be taken to the fact that the organization certificate was acknowledged before a notary, who was at the same time a stockholder in the association.<sup>6</sup>

A copy of the certificate of organization of a national banking association, certified by the Comptroller of the Currency, is properly admitted in evidence by a State court, under section 6 of the act of 1864, and would be so independently of this legislation, since such certificates, when filed, are a part of the public records, and may be proved by duly authenticated copies.<sup>7</sup>

Plaintiff, organized under act of 1864, ch. 106, was described in the writ as "a corporate body organized under the laws of the United States of America, and having an established place of business at Bangor in the State of Maine." At the trial, the plaintiff, in proof of its corporate existence and organization, offered a certificate under the hand and seal of the Comptroller of the Currency, setting forth that it had been made to appear that "the Merchants' National Bank of Bangor, in the city of Bangor, in the county of Penobscot and State of Maine," had been duly

<sup>3</sup> *Cooke v. State National Bank*, 52 N. Y. 96; *Chatham National Bank v. Merchants' National Bank*, 4 Thomp. & C. (N. Y.) 196.

<sup>4</sup> R. S. 5134, 5169, 5170. See §§ 6, 12, 201, 202.

<sup>5</sup> *National Bank of the Metropolis v. Orcutt*, 48 Barb. (N. Y.) 256.

<sup>6</sup> *Thatcher v. West River National Bank*, 19 Mich. 196.

<sup>7</sup> *Tapley v. Martin*, 116 Mass. 275. See U. S. Rev. Stat. § 885.

organized, and certifying that it was duly authorized to commence business under the act of 1864. The book-keeper in a bank in Boston, Massachusetts, testified that he knew that the plaintiff did a banking business under the aforesaid name; that he had recently been in their banking-house in Bangor, and was well acquainted with their cashier, and that his own bank was in the habit of receiving remittances from the plaintiff bank. Defendant objected to all the foregoing testimony; but the court admitted it as being competent to show that plaintiff was *de facto* a banking corporation, and transacting business as such.<sup>8</sup>

Where the corporate existence of a national bank was a point in issue in an action by the bank against the maker of a promissory note, the fact that the bank was mentioned as the place of payment was ruled not to be conclusive evidence that the bank was a corporation.<sup>9</sup>

In another case in which the same issue was raised, the court said that, where "the party attempting to raise such an issue has accepted as payee a promissory note made payable at a banking institution which the parties to the note style a national bank, and has sold and transferred said note to said banking institution, he cannot be allowed to raise the issue by merely averring want of knowledge or information sufficient to form a belief as to whether the institution is a body corporate, organized and doing business under the act of Congress."<sup>10</sup>

Beyond this, it has also been said that a person who has been accustomed to deal with a national banking association as such is thereafter estopped to deny its corporate character.<sup>11</sup>

The certificate of the Comptroller, as to the organization of the bank, is conclusive in suits against either stockholders or creditors. Such certificate is also competent evidence as to the name of the corporation.<sup>12</sup>

A party who as payee has accepted a promissory note payable at a banking institution which the parties to the note style a national bank, and has sold and transferred the note to such

<sup>8</sup> Merchants' National Bank of Bangor v. Glendon Co., 120 Mass. 97.

<sup>9</sup> Hungerford National Bank v. Van Nostrand, 106 Mass. 559.

<sup>10</sup> Lindsay, C. J., Huffaker v. National Bank of Monticello, 12 Bush (Ky.) 287.

<sup>11</sup> National Bank of Fairhaven v. Phoenix Warehousing Co., 6 Hun (N. Y.) 71.

<sup>12</sup> Thatcher v. West River National Bank, 19 Mich. 196; Washington County National Bank v. Lee, 112 Mass. 521.

banking institution, will not be allowed to put in issue the organization thereof under the national banking law by merely averring want of knowledge sufficient to form a belief whether the institution is a body corporate.<sup>13</sup>

### § 208. Powers of a National Bank.

Synopsis. See I. § 47 *et seq.*

Incidental powers. § 108.

Right to deal in stocks and bonds. § 108 *a.*

Right to deal in United States government bonds. § 108 *b.*

Right to hold security for others. § 108 *c.*

Cashier's term of office. § 108 *d.*

Illegal security. § 108 *e.*

Pledges of personal property to bank. § 108 *f.*

Place of transacting business. § 108 *g.*

**Incidental Powers.**<sup>1</sup> — In the act of 1864, section 8, the words “by discounting promissory notes”, etc., do not limit the modes of exercising the incidental powers granted, but limit and define the kind of banking which is authorized by the act. That is to say, the bank is authorized to carry on “banking by discounting”<sup>1a</sup> and negotiating promissory notes”, etc., and to exercise “all such incidental powers as shall be necessary” for that purpose.<sup>2</sup>

This section has been said to embody five distinct grants of power, no one of which operates as a limitation upon any other.<sup>3</sup>

(*a*) **The Right of a National Bank to deal in Stocks and Bonds.** — Under section 8 of the act of 1864 the authority to “exercise under this act all such incidental powers as shall be necessary to carry on the business of banking”, etc., is limited to the exercise of such powers as are incidental to the specific functions which the

<sup>13</sup> *Huffaker v. National Bank of Monticello*, 12 Bush (Ky.) 287.

<sup>1</sup> § 208. R. S. 5136, 5190. See § 8.

<sup>1a</sup> “Discounting” is sufficiently comprehensive to include acquisition by way of purchase and by way of ordinary loan. *Morris v. Third National Bank*, 142 Fed. 25 (1905).

A national bank may discount the paper of its director who at the time is acting as the agent for another and not for the bank. *St. John National Bank v. Steel*, 135 Mich. 165, 97 N. W. 704 (1903).

<sup>2</sup> *Shinkle v. First National Bank of Ripley*, 22 Ohio St. 516.

The powers do not include a general contract of guaranty to become liable for the debt of another, *Appleton v. Citizens' Central National Bank*, 116 App. Div. 404 (1906), 101 N. Y. S. 1027; or to bind itself that a draft on its customer will be paid, *First National Bank v. American National Bank*, 173 Mo. 153, 72 S. W. 1059 (1903); or to represent that a signature is genuine, *Commercial National Bank v. First National Bank*, 97 Tex. 536, 80 S. W. 601, 104 Am. St. Rep. 879 (1904).

<sup>3</sup> *Shoemaker v. National Mechanics' Bank*, 2 Abb. (U. S.) 416.

section proceeds to set forth. Thus, the section names "exchange, coin, and bullion" as things which the bank may buy and sell, but it does not name stocks and bonds. The power to buy and sell stocks and bonds is not expressly given, and is not incidental to any of the functions named.<sup>3a</sup> It does not, therefore, inhere in the bank, and such transactions are *ultra vires* and illegitimate.<sup>4</sup>

But where the circumstances show the bank to have come into possession of such shares in compromising a claim, and for the purpose of averting an apprehended loss growing out of a legitimate dealing, the transaction will be upheld as lawful.<sup>5</sup>

A national bank may receive stocks and bonds as collateral security for contemporaneous and future advances, this being a transaction incident to the usual course of banking business. The bank assumes, upon the receipt of such bonds, the position of an ordinary bailee, and in case the bonds are stolen the bank will be responsible if there shall appear to have been an absence of proper and sufficient care on its part. The measure of damages will be the value of the bonds at the time when they were stolen.<sup>6</sup>

A national bank may purchase corporate bonds issued by the board of education of a city, since they are evidences of debt.<sup>6a</sup>

A national bank, which had accepted and caused to be transferred to it shares of stock of another national bank, was, on the latter becoming insolvent, sued as a stockholder. *Held*, that a

<sup>3a</sup> By this is meant a purchase for speculation or investment, or the purchase and sale on commission. It does not mean that a national bank may not take title to stocks in compromise of a disputed or doubtful claim, or take them in pledge, or purchase them to protect or satisfy a claim. Such would be merely incidental to the business of making loans. But stocks so purchased must be disposed of as soon as a sale can be made to proper advantage. *McBoyle v. Union National Bank*, 162 Cal. 277, 122 Pac. 458 (1912).

<sup>4</sup> *Weekler v. First National Bank of Hagerstown*, 42 Md. 581; *First National Bank of Charlotte v. National Exchange Bank of Baltimore*, 39 Md. 600.

But if a bank purchase stock under an *ultra vires* contract the title is in the bank and may be transferred to another before the contract is repudiated. *Barron v. McKinnon*, 196 Fed. 933 (1912).

<sup>5</sup> *First National Bank of Charlotte v. National Exchange Bank of Baltimore*, 39 Md. 600.

<sup>6</sup> *Third National Bank of Baltimore v. Boyd*, 44 Md. 47; *Canfield v. State National Bank*, 26 Minn. 62; *Thompson's National Bank Cases*, 312.

<sup>6a</sup> *Newport National Bank v. Board of Education*, 114 Ky. 87, 70 S. W. 186 (1903).

loan of money by a national bank on such security is not prohibited by law; and, if it were, the defendant could not set up its own illegal act to escape the responsibility resulting therefrom.<sup>7</sup>

As no authority, express or implied, has ever been conferred upon a national bank to engage in or promote a purely speculative business or adventure, a bank has no power to engage in or take stock in such business, and if it does so the transaction is *ultra vires* and the bank is not liable for assessments on such stock.<sup>7a</sup> Nor can it become the owner of shares in a partnership of a speculative character.<sup>7b</sup> And it is estopped from denying that it is a partner or that it is liable for the debts of the firm.<sup>7b</sup>

**(b) The Right of a National Bank to deal in United States Government Bonds.** — A national banking association may properly and lawfully engage in the business of exchanging securities of the government of the United States; and will be liable to the depositor of bonds, intended to be exchanged, for their value in case of non-fulfilment of the contract.<sup>8</sup> To the like purport is the ruling that a national bank may lawfully engage and contract to purchase such government securities for a customer.<sup>9</sup>

A national bank may purchase municipal bonds as an investment of its surplus funds.<sup>9a</sup>

**(b<sup>1</sup>) The Rights of a National Bank to Act as Trustee.** — A national bank cannot act as a technical trustee and hold land for the benefit of third persons. It cannot act as trustee under a railroad mortgage or take property to be held for the life of the grantor with remainder to his children. Such transactions would be voidable at the instance of the government.<sup>9a</sup> But it may act as a fiduciary and occupy a trust relation in matters connected with that business.<sup>9b</sup> It may do those acts and occupy those re-

<sup>7</sup> *National Bank v. Case*, 99 U. S. 628, 25 L. ed. 448.

<sup>7a</sup> *First National Bank v. Converse*, 200 U. S. 425, 50 L. ed. 537, 26 Sup. Ct. 306 (1906).

<sup>7b</sup> *Merchants' National bank v. Wehrmann*, 202 U. S. 295, 50 L. ed. 1036, 26 Sup. Ct. 613 (1906), reversing 69 Ohio State 160, 68 N. E. 1004 (1903).

<sup>8</sup> *Van Leuven v. First National Bank of Kingston*, 54 N. Y. 671; *Leach v. Hale*, 31 Iowa 69.

<sup>9</sup> *Caldwell v. National Mohawk Valley Bank*, 64 Barb. (N. Y.) 333.

<sup>9a</sup> *Junction City v. Central National Bank*, 96 Kan. 407, 153 Pac. 28 (1915); *Newport National Bank v. Board of Education*, 114 Ky. 87, 70 S. W. 816 (1902).

<sup>9b</sup> *Kerfoot v. Farmers' Bank*, 218 U. S. 281, 54 L. ed. 1042, 31 Sup. Ct. 14 (1910); *Miller v. King*, 223 U. S. 505, 56 L. ed. 528, 32 Sup. Ct. 243 (1912).



lations which are usual or necessary in making collections of commercial paper and other evidences of debt.<sup>9b</sup>

(b<sup>2</sup>) **Right of a National Bank to Act as Assignee of a Judgment.** — A national bank may be the assignee of a judgment to collect the same and distribute as directed, when the judgment was not transferred for the mere purpose of enabling it to bring suit in its own name; and in Oregon when a national bank holds such a judgment it may sue thereon in its own name.<sup>9b</sup>

(c) **Right of a National Bank to hold Security for Others.** — A national bank probably has authority to receive a deposit as a collateral security for the fulfilment of a contract between outside parties. But even if the transaction is *ultra vires* on the part of the bank, the association would nevertheless be estopped to deny its legality in an action brought by the party to whose use the money had been deposited, and who had entered into the original contract on the strength of the representations of the bank.<sup>10</sup>

A national bank which received a note executed by a third person for the accommodation of the cashier who was indebted to the bank, and who pledged collateral attached to the note, to secure it, must be deemed to have contracted to keep the pledged security for the benefit of the maker, and its failure to do so is a breach of contract.<sup>10a</sup>

(d) **Cashier's Term of Office.** — Under the banking act, the cashier of a national bank cannot be irrevocably appointed for a definite time. He is liable to be dismissed at any time, at the pleasure of the appointing power.<sup>11</sup>

(e) **Taking Illegal Security.** — If a national bank, in making a loan, takes security of a character which, under the statute, it has no right to take, but subsequently such security is surrendered, the effect and consequences of the illegality are thereby

<sup>9b</sup> *Miller v. King, supra*. See *American Can Co. v. Williams*, 176 Fed. 816 (1908); *Morris v. Third National Bank*, 142 Fed. 25 (1905); *Bank of Bay Biscayne v. Monongahela National Bank*, 126 Fed. 436 (1903).

<sup>10</sup> *Bushnell v. The Chautauqua County National Bank*, 10 Hun (N. Y.) 378.

<sup>10a</sup> *Skud v. Tillingham*, 195 Fed. 1 (1912).

<sup>11</sup> *Harrington v. First National Bank of Chittenango*, 1 Thomp. & C. (N. Y.) 361.

When the affairs of a national bank which has become insolvent are wound up by the Comptroller, and it ceases to do business, the term of the cashier and all officers who do business at the will of the directors are terminated. *Kimball v. Marine National Bank*, 112 Minn. 450, 128 N. W. 678 (1910).

at an end. The bank may subsequently take security of precisely the same kind, for the purpose of securing the debt which has then become already created and pre-existing.<sup>12</sup>

An agreement between persons insolvent and a bank, whereby the insolvents, for the purpose of securing their existing indebtedness to the bank, as well as to obtain future advances, promised its president to deliver to the bank, whenever it may desire, the entire stock of goods which they may have at the time on hand in a store kept by them, the goods being in the mean time retained in their possession, is void, as against their other creditors. Such an agreement does not create any lien upon the property, or entitle the bank to any preference over other creditors, in the event of the debtor's being afterwards proceeded against under the bankrupt law. Any subsequent sale made in pursuance of the agreement does not take effect by relation to its date.<sup>13</sup>

(f) **Pledges of Personal Property to Bank.** — A national bank has authority to take personal property,<sup>14</sup> or a mortgage of any personalty, as collateral security for a pre-existing debt.<sup>15</sup>

A State statute invalidating preferences made by insolvent debtors and assignments on transfers made in contemplation of insolvency does not conflict with the above powers.<sup>15a</sup>

When a question arises involving the right of national banks to make loans of a particular character upon mortgage, the assignee should be permitted to litigate such question in the Federal courts, and should not be sent into the State courts to try it on the distribution of surplus moneys in a foreclosure suit, or in a suit brought by the party holding the alleged invalid mortgage.<sup>16</sup>

Only the United States can be heard on the question whether a national bank is authorized to make a loan under Rev. Sts. §§ 5136, 5137.<sup>16a</sup>

It is the duty of a bank to return a pledge, or show good reasons

<sup>12</sup> *Spafford v. First National Bank of Tama City*, 37 Iowa 181.

<sup>13</sup> *Bank of Leavenworth v. Hunt*, 11 Wall. 391, 20 L. ed. 190.

<sup>14</sup> *Pittsburg Locomotive and Car Works v. State National Bank*, 2 Cent. Law Jour. 692; *Thompson's National Bank Cas.* 315.

<sup>15</sup> *Spafford v. First National Bank of Tama City*, 37 Iowa 181.

<sup>15a</sup> *McClellan v. Chipman*, 164 U. S. 347, 41 L. ed. 461, 17 Sup. Ct. 85 (1896).

<sup>16</sup> *In re Duryea*, 17 National Bank Reg. 495.

<sup>16a</sup> *Camp v. Land*, 122 Cal. 167, 54 Pac. 839.

State courts must follow the United States courts as to the powers of national banks. *Security National Banks v. St. Croix Power Co.*, 117 Wis. 211, 94 N. W. 74 (1903).

why it does not. The seizure of a bank by military order, and the appointment of military commissioners who took possession of its assets, is a sufficient ground of defence to an action by the bailee.<sup>17</sup>

(g) **Place of Transacting Business.**<sup>17a</sup> — The National Banking Act requires “the usual business” of the association to be transacted “at an office or banking-house in the place specified in its organization certificate.” This provision is, however, to be construed reasonably. “The business of every bank away from its office — frequently large and important — is unavoidably done at the proper place by the cashier in person, or by correspondents or other agents.” Thus, where a cashier bought gold and paid for it by certifying checks at the counter of another bank, it was held to be perfectly proper for him to do so.<sup>18</sup>

The general business of a national bank must be transacted at the place of its location. At the same time we know that in the course of business between banks occasionally the officers do give instructions away from the place of business of the bank. If the bank doing such business sends a statement of the same to the other bank, and it, through its proper officer, recognizes the validity of the same, it is bound by such recognition.<sup>19</sup>

A national bank located in New Jersey for the convenience of persons in Philadelphia kept a clerk in that city, who received deposits. *Held*, that the bank did not become located in Philadelphia so as to be liable for taxes. The fact that it violated the law did not make it a citizen of Philadelphia.<sup>20</sup>

A national bank organized in another State is prohibited from keeping an office of discount or deposit in the city of New York, and cannot maintain an action upon any note discounted by it at such office. This prohibition arises from the fact that the bank is a foreign corporation, and from the provisions of the Revised Statutes (Vol. I. p. 708, 2d edition) of New York.<sup>21</sup>

<sup>17</sup> *McLemore v. Louisiana State Bank*, 91 U. S. 27, 23 L. ed. 196.

<sup>17a</sup> See Fed. Res. Act, Sec. 25, § 193, on the establishment of foreign branches.

<sup>18</sup> *Merchants' National Bank v. State National Bank*, 10 Wall. 604, 19 L. ed. 1008.

<sup>19</sup> Judge Drummond, in *Burton v. Burley*, 12 Chic. Leg. News 178; s. c. 9 Rep. 301.

<sup>20</sup> *National Bank of Camden v. Pierce*, 18 Alb. Law Jour. 16 (U. S. C. C., W. D. Penn.).

<sup>21</sup> *National Bank of Fairhaven v. The Phoenix Warehousing Co.*, 6 Hun (N. Y.) 71.

A national bank which has been organized under conditions applicable to a small suburb is not entitled to remove its place of business to the business section of the reserve city after the suburb has become a part of the city, without complying with the Comptroller's conditions.<sup>22</sup>

§§ 209, 210. **President.**<sup>1</sup> — Under the act of 1863, section 9, it has been held that the directors have power to remove the president at any time, whether by-laws have been adopted by the association and approved by the Comptroller of the Currency or not.<sup>2</sup>

The directors may discharge any employee at any time for cause. A national bank cannot hire its officers for any specified time,<sup>3</sup> unless they are subject to removal by the board of directors.<sup>3a</sup>

§ 212. **Lien of Bank on Shareholder's Shares and Dividends.**<sup>1</sup> — The act of 1864 (superseding in this respect the act of 1863) places shareholders in a national bank precisely upon the same footing as outsiders in all dealings with the bank; the bank cannot, by articles of association or by-laws, establish any lien on the shares of a shareholder for his indebtedness to the bank;<sup>1a</sup> cannot make loans to him in any shape or form upon the security of such shares; and cannot prevent the transfer of the shares by a by-law declaring that they shall not be transferred while the holder is indebted to the bank. The only circumstance which will justify a bank in taking shares of its own capital stock, by way of security, is where this becomes necessary in order to secure an antecedent indebtedness contracted independently of such security. Thus, where a shareholder sold his shares, and the purchaser, bringing a sufficient power of attorney, applied to the bank to transfer them to him, it was held that he was entitled to receive them, or, in default thereof, to maintain his suit for damages, in spite of the fact that the bank had taken them as security for a debt owing from the shareholder, and had actually (under this title) sold some of them, and had passed a by-law prohibiting the transfer of shares by a shareholder in-

<sup>22</sup> *First National Bank v. Murray*, 212 Fed. 140 (1914).

<sup>1</sup> §§ 209, 210. R. S. 5150. See §§ 9, 10.

<sup>2</sup> *Taylor v. Hutton*, 43 Barb. (N. Y.) 195.

<sup>3</sup> *Harrington v. First National Bank*, 1 Thomp. & C. (N. Y.) 361.

<sup>3a</sup> *Rankin v. Tygard*, 198 Fed. 795 (1912).

<sup>1</sup> § 212. R. S. 5139. See § 12.

<sup>1a</sup> *Third National Bank v. Buffalo German Insurance Co.*, 193 U. S. 581, 48 L. ed. 801, 24 Sup. Ct. 524 (1904). See *Bridges v. Troy National Bank*, 185 N. Y. 146, 77 N. E. 1005 (1906).

debted to the bank.<sup>2</sup> This decision has been followed by Judge Drummond in the United States Circuit Court for the District of Indiana;<sup>3</sup> also in Maine<sup>4</sup> and in Kentucky.<sup>5</sup> But a contrary doctrine has been asserted by Mr. Justice Clifford and Mr. Justice Sawyer, and by the Supreme Court of Rhode Island.<sup>6</sup>

In New York the court have said that the act of Congress of 1864 does not embody section 36 of the act of 1863, and under it, therefore, there is no express authorization for the directors to establish, by a by-law, a lien upon the shares of a shareholder for his indebtedness to the bank. But it would seem that the power to do this might be contained in the articles of association, and, if embodied in them, would be valid. But if the power be not set forth in these articles, then it does not exist, and any by-law undertaking to establish such a lien is null and void.<sup>7</sup>

But the bank may attach shares of its own capital stock in a suit against a shareholder, just as it might attach shares belonging to him in any other corporation.<sup>8</sup>

Further, the bank may hold back dividends payable to a shareholder, as an offset against his indebtedness to the bank; and this too though the dividends had been substantially earned before the indebtedness accrued.

(a) **Transfer of Stock.**<sup>9</sup>—By the United States Revised Statutes, § 5139, shares of stock in a national bank are transferable only on the books of the bank.<sup>10</sup>

<sup>2</sup> *Bank v. Lanier*, 11 Wall. 369, 20 L. ed. 172; *Bullard v. Bank*, 18 *id.* 589, 21 L. ed. 923; *Johnson v. Laffin*, 17 Alb. Law Jour. 146; *Third National Bank v. Buffalo German Ins. Co.*, 193 U. S. 581, 48 L. ed. 801, 24 Sup. Ct. 524 (1904).

<sup>3</sup> *Evansville National Bank v. Metropolitan National Bank*, 6 Am. Law Rev. 574; *Thompson's National Bank Cas.* 189.

<sup>4</sup> *Hagar v. Union National Bank*, 63 Me. 509.

<sup>5</sup> *Bank of Louisville v. Bank of Newark*, 7 Chic. Leg. News, 70.

<sup>6</sup> *Knight v. Old National Bank*, 4 American Law Times Reports, 240; *Thompson's National Bank Cas.* 929; *Pendegast v. Bank of Stockton*, 6 Am. Law Rev. 575; *Lockwood v. Mechanics' National Bank*, 9 R. I. 308.

<sup>7</sup> *Rosenback v. Salt Springs National Bank*, 53 Barb. (N. Y.) 495; *Conklin v. Second National Bank*, *id.* 512; *Bridges v. National Bank*, 185 N. Y. 146, 77 N. E. 1005 (1906).

So there can be no lien upon the assets which the stock represents when distributed upon liquidation of the affairs of the bank. *Bridges v. National Bank*, *supra*.

<sup>8</sup> *Hagar v. Union National Bank*, 63 Me. 509.

<sup>9</sup> R. S. 5139. See § 12.

<sup>10</sup> *Weyer v. Second National Bank of Franklin*, 57 Ind. 198.

The provisions of U. S. Rev. Statutes, § 5139, providing that stock

One who allows a transfer of shares of the capital stock in a national bank to be made to him upon the books of the bank, even though it is done solely to secure a debt due him, becomes individually liable as a stockholder, within the U. S. Rev. Sts. § 5138.<sup>11</sup>

A purchaser of national bank stock cannot, by having the transfer made to a third person, escape liability as a stockholder, within the U. S. Rev. Sts. § 5151.<sup>12</sup>

Where a transfer of national bank stock is *bona fide*, and not a mere sham, and is made without knowledge by the transferrer, of the embarrassed condition of the bank, it cannot be set aside by the receiver, even although the consideration is good but not valuable.<sup>12a</sup> And such transfer relieves the transferrer from further liability.<sup>12b</sup>

But if a stockholder knows of the insolvency of the bank he cannot escape liability by making a transfer to another.<sup>12c</sup>

shall be transferred by indorsement on the books of the corporation are for the protection and convenience of the corporation and may be waived by it, and they do not limit the right of passing title to stock certificates by indorsement. *Gray v. Frankhauser*, 58 Or. 423, 115 Pac. 146 (1911).

<sup>11</sup> *Moore v. Jones*, 3 Woods 53.

And as far as the bank is concerned one is not a stockholder until the transfer is made upon the books of the bank. *Jones v. Beaver National Bank*, 150 App. Div. 145 (1912), 134 N. Y. S. 776.

<sup>12</sup> *Case v. Small*, 4 Woods 78; *Stuart v. Hayden*, 169 U. S. 1, 42 L. ed. 639, 18 Sup. Ct. 274 (1897).

<sup>12a</sup> *Sykes v. Halloway*, 81 Fed. 432 (1897).

The power to transfer stock "like other personal property" exists even though the bank is insolvent unless it is shown that the vendor was aware of the fact and sold his stock to avoid the double liability which was impending. *Earle v. Carson*, 188 U. S. 42, 47 L. ed. 373, 23 Sup. Ct. 254 (1902). But the power to transfer ceases upon the expiration of the bank's charter. *Muir v. Citizens' National Bank*, 39 Wash. 57, 80 Pac. 1007 (1905).

<sup>12b</sup> *McDonald v. Dewey*, 202 U. S. 510, 50 L. ed. 1128, 26 Sup. Ct. 731 (1905). See also *Fowler v. Crouse*, 175 Fed. 646 (1910); *Vandagriff v. Rich Hill Bank*, 163 Fed. 823 (1908); *Hulitt v. Ohio Valley National Bank*, 137 Fed. 461 (1905), affirmed in 204 U. S. 162, 51 L. ed. 423, 27 Sup. Ct. 179; *Earle v. Carson*, 188 U. S. 42, 47 L. ed. 373, 23 Sup. Ct. 254 (1902), affirming 107 Fed. 639.

<sup>12c</sup> *McDonald v. Dewey*, 202 U. S. 510, 50 L. ed. 1128, 26 Sup. Ct. 731 (1906); *Earle v. Carson*, 188 U. S. 42, 47 L. ed. 373, 23 Sup. Ct. 254 (1902). See also *Rankin v. Fidelity Ins. etc. Co.*, 189 U. S. 242, 47 L. ed. 792, 23 Sup. Ct. 553 (1902); *Aldrich v. Bingham*, 131 Fed. 363 (1904); *Fowler v. Crouse*, 175 Fed. 646 (1910), holding that knowledge is not imputed simply from the fact that the stockholder was a director.

A deed of "all property, real and personal", conveys the grantor's share of bank stock.<sup>13</sup>

A transfer of national bank shares does not pass the right to any interest in a special trust fund created prior to the transfer.<sup>13a</sup>

A *by-law of a national bank*, though indorsed on a stock certificate, prohibiting a stockholder who is indebted to the bank from transferring his certificate, is void, as in contravention of the U. S. Rev. Sts. § 5201, forbidding banks to loan on security of their own stock.<sup>13</sup> On refusal to make such transfer, the stockholder could maintain a suit for specific performance.<sup>13</sup>

(b) **Liability of Stockholders.**<sup>14</sup> — *The liability of a shareholder in a national bank for its debts is held to be discharged by his discharge in bankruptcy*, although the petition in bankruptcy was filed after suit brought to enforce the liability.<sup>15</sup>

U. S. Rev. Sts. § 5151, — making the *shareholders individually liable* for the bank's contracts to the amount of their stock at par value in addition to the amount invested in such shares,<sup>15a</sup> — makes this liability an asset of the bank; to be resorted to in case of insolvency,<sup>15b</sup> as a sort of guaranty fund.<sup>16</sup> The general purpose of the statute was to confer upon the creditor of a bank a right to resort to the individual liability of shareholders to the extent, if necessary, of the amount of their capital stock.<sup>16a</sup>

One who is a shareholder at the time of the bank's insolvency cannot thereafter, as against creditors, have the purchase rescinded because of misrepresentations and deceit of an officer of the bank at the time of the purchase.<sup>16b</sup> Nor can he escape liability as against creditors by transferring his stock after the bank closes its doors.<sup>16c</sup>

<sup>13</sup> Feckheimer v. National Exchange Bank of Norfolk, 79 Va. 80.

All the provisions found in section 36 of the act of 1863 empowering the board of directors of a national bank to withhold a transfer of the stock of a stockholder indebted to the bank were expressly repealed by U. S. Rev. Sts. § 5139. Third National Bank v. Buffalo German Ins. Co., 193 U. S. 581, 48 L. ed. 801, 24 Sup. Ct. 524 (1904).

<sup>13a</sup> Cogswell v. Second National Bank, 78 Conn. 75, 60 Atl. 1059 (1904).

<sup>14</sup> R. S. 5157. See § 259 d.

<sup>15</sup> Irons v. Manufacturers' National Bank of Chicago, 17 Fed. 308.

<sup>15a</sup> McClaine v. Rankin, 197 U. S. 154, 49 L. ed. 702, 25 Sup. Ct. 410 (1905).

<sup>15b</sup> The liability arises only in case of liquidation. Weinhard v. Commercial National Bank, 41 Or. 359, 68 Pac. 806 (1902). See Aldrich v. Bingham, 131 Fed. 363 (1904).

<sup>16</sup> Irons v. Manufacturers' National Bank, 21 Fed. 197.

<sup>16a</sup> Studebaker v. Perry, 184 U. S. 258, 46 L. ed. 528, 22 Sup. Ct. 463 (1902).

<sup>16b</sup> Salter v. Williams, 219 Fed. 1017 (1914).

<sup>16c</sup> Graham v. Platt, 28 Colo. 421, 65 Pac. 30 (1901).

A stockholder in a national bank is not relieved from his individual liability under the United States Revised Statutes, § 5151, merely by the fact that, with his assent, he has been assessed under § 5205 to restore the impaired capital.<sup>17</sup>

If a national bank assumes, the debts of an insolvent bank contemplating liquidation in consideration of a transfer of certain of its available assets, and notes for the balance, such notes represent the "contracts, debts, and engagements" of the insolvent bank, for which its stockholders are responsible.<sup>17a</sup>

The liability of a stockholder under U. S. Rev. Sts., § 5151, applies only to those who are the owners of stock, and does not apply to a *bona fide* pledgee of said stock,<sup>17a</sup> nor to one who purchases stock in his own name as trustee for his minor children but does not hold himself out as owner of the stock.<sup>17b</sup>

When the bank goes into liquidation, both assenting and non-assenting stockholders are subject to their additional liability under U. S. Rev. Sts., § 5151,<sup>17c</sup> and it is immaterial that a stockholder voted against liquidation if the required amount of stock was voted in its favor.<sup>17d</sup>

"After the Comptroller, in order to discharge the liabilities of an insolvent national bank, has assessed <sup>17e</sup> against the several shareholders a sufficient *percentage upon the par value* of the stock by them respectively held, he has *no power to direct a further assessment to supply the deficit caused by the inability of the receiver to enforce payment* from such as are insolvent or beyond the jurisdiction." <sup>18</sup>

<sup>17</sup> Morrison v. Price, 23 Fed. 217.

<sup>17a</sup> George v. Wallace, 135 Fed. 286 (1904).

<sup>17a</sup> Williamson v. American Bank, 185 Fed. 66 (1911).

<sup>17b</sup> Fowler v. Gowing, 152 Fed. 801 (1907); *id.*, 165 Fed. 891 (1908).

<sup>17c</sup> Wyman v. Wallace, 201 U. S. 230, 50 L. ed. 738, 26 Sup. Ct. 495 (1906), affirming 135 Fed. 286.

<sup>17d</sup> Poppleton v. Wallace, 201 U. S. 245, 50 L. ed. 743, 26 Sup. Ct. 498 (1906), affirming 135 Fed. 286.

<sup>17e</sup> The power to assess belongs exclusively to the Comptroller. Studebaker v. Perry, 184 U. S. 258, 46 L. ed. 528, 22 Sup. Ct. 463 (1902). But see Commercial National Bank v. Weinhard, 192 U. S. 243, 48 L. ed. 425, 24 Sup. Ct. 253 (1904), affirming 41 Or. 359, 68 Pac. 806.

<sup>18</sup> United States v. Knox, 102 U. S. 422, 26 L. ed. 216.

If the first assessment is insufficient to pay the debts and liabilities of the bank the Comptroller may levy another assessment. Studebaker v. Perry, 184 U. S. 258, 46 L. ed. 528, 22 Sup. Ct. 463 (1902); McClaine v. Rankin, 197 U. S. 154, 49 L. ed. 702, 25 Sup. Ct. 410 (1905); Rankin v. Barton, 199 U. S. 228, 50 L. ed. 163, 26 Sup. Ct. 29 (1905); Rankin v. Miller, 207 Fed. 602 (1913); Studebaker v. Perry, 184 U. S. 258, 46 L. ed. 528, 22



The assignee for the benefit of creditors of a stockholder is bound to pay the assessment levied by the receiver of the bank after its insolvency, though it is levied after the assignment.<sup>18a</sup>

An assessment levied on the stockholders of a national bank, by the Comptroller, draws interest from the date when payable.<sup>18a</sup>

The liability of a stockholder of a national bank is several, and is fixed by the mere act of his taking stock in the corporation.<sup>19</sup>

The liability of the stockholders is several, and not joint. The limit of their liability is the par value of the stock held by each one.<sup>20</sup>

The liability of a stockholder is secondary and not a security.<sup>20a</sup>

The Comptroller is to decide when to enforce the personal liability of stockholders, and whether the whole or a part is to be sued for. His discretion in these matters is conclusive, and his action must precede the institution of any suit for this purpose by a receiver.<sup>20</sup>

A religious society which, with a fund previously bequeathed to it, buys and holds in its own name shares of a national bank, is not to be regarded as a trustee, but as an ordinary stockholder, and liable to an *assessment* for the debts of the bank on its *failure*. To protect a trustee who is also a stockholder from

Sup. Ct. 463 (1902). But an assessment of 49% cannot be enforced while a previous assessment of 100% is still in force. *Pepper v. Springfield Institution for Savings*, 218 Fed. 814 (1915). And the assessment is not annulled by a letter written by the Comptroller approving a contemplated sale of bonds by the bank and stating that such sale will probably make an assessment unnecessary. *Pepper v. Springfield Institution for Savings, supra*.

<sup>18a</sup> *Graham v. Platt*, 28 Colo. 421, 65 Pac. 30 (1901).

<sup>18a</sup> *Estate of Davis v. Watkins*, 56 Neb. 288, 76 N. W. 575.

<sup>19</sup> *Bailey v. Sawyer*, 9 Chic. Leg. News 191.

<sup>20</sup> *Kennedy v. Gibson*, 8 Wall. 505, 19 L. ed. 479; *Rankin v. Barton*, 199 U. S. 228, 50 L. ed. 163, 26 Sup. Ct. 29 (1906); *McClaine v. Rankin*, 197 U. S. 154, 49 L. ed. 702, 25 Sup. Ct. 410 (1905); *McDonald v. Thompson*, 184 U. S. 71, 46 L. ed. 437, 22 Sup. Ct. 297 (1902); *Studebaker v. Perry*, 184 U. S. 258, 46 L. ed. 528, 22 Sup. Ct. 463 (1902); *Rankin v. Miller*, 207 Fed. 602 (1913); *Waldron v. Alling*, 73 App. Div. 86 (1902), 76 N. Y. S. 250; *Rankin v. Barton*, 69 Kan. 629, 77 Pac. 531 (1904); *Thomas v. Gilbert*, 55 Or. 14, 101 Pac. 393, 1912A Ann. Cas. 516; *Fish v. Olin*, 76 Vt. 120, 56 Atl. 533 (1903). But see *King v. Pomeroy*, 121 Fed. 287 (1903), holding that no action of the court is necessary when the court appoints a receiver. His determination cannot be impeached in a receiver's action to recover the assessment, except for want of jurisdiction, bad faith, or other grounds of equitable interference. *Rankin v. Ware*, 88 Kan. 23, 127 Pac. 531 (1912).

<sup>20a</sup> *McClaine v. Rankin*, 197 U. S. 154, 49 L. ed. 702, 25 Sup. Ct. 410 (1905).

such liability, it must appear on the books of the bank that he was such trustee.<sup>21</sup>

The Comptroller's order describing the extent to which the liability shall be enforced <sup>21a</sup> is conclusive upon all.<sup>22</sup>

§ 213. (a) **Increase of Capital of National Bank.**<sup>1</sup>—There can be no increase in the capital of a national bank prior to the approval of the Comptroller of the Currency and the issue of his certificate in accordance with section 13 of the act of 1864. Accordingly, where the increase was voted, the new shares subscribed and paid for before January 1, 1872, and a dividend declared, payable on both old and new shares, on January 1, 1872, but the Comptroller did not approve the increase, nor issue his certificate, until January 5, 1872, it was *held*, that the new shares were not, for purposes of taxation, "in the hands of the taxpayers on the 1st of January, 1872."<sup>2</sup>

The certificate of Comptroller authorizing an increase of the capital stock, is conclusive of the facts necessary to be ascertained and to authorize his certificate and cannot be called thereafter in question by subscribers.<sup>2a</sup>

(b) By the articles of association of a national bank, its capital might be increased according to the provisions of the U. S. Rev. Sts. § 5142, and each stockholder had the privilege of subscribing for the increase in proportion to the number of shares already held by him. The directors also had the power to provide for an increase of capital, and to regulate the manner in which it should be made. A by-law of the bank provided that, when an increase of stock should be determined on, the board of directors should notify the stockholders, and cause a subscription to be opened for the same; and that if any stockholder failed to

<sup>21</sup> *Davis v. First Baptist Society of Essex*, 44 Conn. 582.

<sup>21a</sup> The liability may be enforced by a creditor's bill, *George v. Wallace*, 135 Fed. 286 (1905), affirmed in 201 U. S. 230, 50 L. ed. 738, 26 Sup. Ct. 495; *Williamson v. American Bank*, 115 Fed. 793 (1902), which must be brought in the federal court in the district in which the bank is located. *George v. Wallace*, *supra*; *Williamson v. American Bank*, *supra*. See *Rankin v. Miller*, 207 Fed. 602 (1913).

<sup>22</sup> *National Bank v. Case*, 99 U. S. 628, 25 L. ed. 448; *Casey v. Galli*, 94 U. S. 673, 24 L. ed. 168; *Bailey v. Sawyer*, 9 Chic. Leg. News 191 (C. C. Minn.); *Rankin v. Miller*, 207 Fed. 602 (1913); *Waldron v. Alling*, 73 App. Div. 86 (1902), 76 N. Y. S. 250. See *Rankin v. Ware*, 88 Kan. 23, 127 Pac. 531 (1912).

<sup>1</sup> § 213. R. S. 5142. See §§ 13 a, 81.

<sup>2</sup> *Charleston v. People's National Bank*, 5 S. C. 103.

<sup>2a</sup> *Tallinghast v. Bailey*, 86 Fed. 46 (1897).

subscribe for his proportion within a reasonable time, which should be stated in the notice, the directors might determine what disposition should be made of the privilege of subscribing for the new stock. While these articles and this by-law were in force, the directors voted to double the capital stock, and a notice was sent to the stockholders accordingly, which also stated when the subscriptions for the new stock were payable. No subscription books were opened, but A., a stockholder who held forty shares, paid the bank \$4000, and took a receipt which stated that this sum was received "on account of subscription to new stock." The Comptroller of the Currency did not certify his approval of this increase of the capital stock, and the whole amount of the increase was not paid in. The bank suspended payment, and a bank examiner was placed in charge of the bank by the Comptroller of the Currency, and he took possession of all the books and assets of the bank. While this state of things continued, the directors met and passed a vote, which, after reciting the former vote, the amount paid in, and the amount not paid in, declared that the latter sum be cancelled and deducted from the capital stock, and that the paid up capital stock amounted to a certain sum, which was equal to the former capital and the amount paid in under the former vote. The Comptroller of the Currency, upon being notified of this vote, issued a certificate that the capital stock was increased by a certain sum, being that paid in. On the same day, the Comptroller of the Currency notified the bank that, as the entire capital stock was lost, an assessment of one hundred per cent was required to make good the deficiency. After this, the bank made out a certificate for forty shares in the so-called increased capital, and A. was registered in the stock register as the owner of forty shares. No notice was given to A. of the last vote, or of the existence of the certificate, and he never assented to any change in the proposed increase of the capital stock, but demanded back the money paid by him. Subsequently, the bank was allowed to resume business. *Held*, that A. could maintain an action against the bank to recover the \$4000 and interest from the time of the demand.<sup>3</sup>

This decision was subsequently affirmed. The case reducing itself to this, the directors voted to raise the capital to \$1,000,000. E., a stockholder, paid in a sum equal to the stock he held, the

<sup>3</sup> *Eaton v. Pacific Bank*, 144 Mass. 260, 10 N. E. 844.

vote being that the stockholders should have a right to take the new stock at par to an amount equal that held by them of the old stock. The whole of the proposed increase was not realized. *Held*, that E. had paid in his money on the implied condition that the increase should bring the stock to \$1,000,000, and was entitled to recover his money.<sup>4</sup>

(c) In September, 1881, A. held thirty shares of stock in a national bank whose capital was \$500,000, with a right to increase it to \$1,000,000. In that month, the directors voted to increase the capital to \$1,000,000, the persons then holding stock to have the right to take new stock at par in amounts equal to those then held by them. A. then subscribed for thirty additional shares, paid for it three days later, and subsequently took out a certificate of stock for it. The amount of increased capital subscribed and paid for was \$461,300, instead of \$500,000, but A. had no knowledge of this deficiency until after the payment of said subscription, and of the assessment hereinafter referred to. On the 18th of November, 1881, the bank became insolvent, and an examiner was placed in charge of it by the Comptroller of the Currency. In December, 1881, the directors cancelled the increase of the stock above said sum of \$461,300, and requested the Comptroller of the Currency to issue a certificate for the increase as so reduced, which he did. No vote of the stockholders was taken, either on increase or decrease. The Comptroller then, under Rev. Sts. § 5205, called upon the bank for an assessment of one hundred per cent on the holders of stock, to pay the deficiency in the capital stock. In January, 1882, the annual meeting of the stockholders was held, at which it was voted to levy the assessment so called for, whereupon the Comptroller permitted the directors to resume control of the bank. A., being notified of this assessment, paid the amount assessed upon his sixty shares, upon being assured by one of the directors of the bank that there would be no other assessment. On the twentieth day of the following May the bank ceased to do business, and the directors thereupon voted to go into liquidation. The Comptroller then appointed a receiver of the bank. In November, 1882, the Comptroller, under Rev. Sts. § 5151, made an assessment on the shareholders of one hundred per cent of the stock held by them respectively. A. declining to pay, the receiver brought an action at law against him to recover that amount on the sixty shares

<sup>4</sup> *Eaton v. Pacific Bank*, 10 N. E. Rep. 844, April, 1887.

standing in his name. A. thereupon filed a bill in equity to restrain the prosecution of the action. *Held*, —

(1) That the increase of the capital stock of the company to \$961,300 was valid.

(2) That this increase was binding on A. to the extent to which he paid for and received certificates of increased stock.

(3) That the payments made in January, 1882, could not be applied, either at law or in equity, to the discharge of the assessments made by the Comptroller in the final liquidation of the bank.

(4) That the payment was not made by A. under a mistake against which equity can relieve him.<sup>5</sup>

“The plaintiff in error, in the action at law, contends, as grounds for reversing the judgment against him, —

“1st. That he was not, at the time of the appointment of the receiver, or at any time, the holder of sixty shares of the stock of the Pacific National Bank, but was, in fact and in law, a holder of only thirty shares thereof. He contends that the attempt on the part of the directors and the Comptroller of the Currency, in December, 1881, to fix the capital stock of the bank at \$961,300, was contrary to law and void; that the alleged thirty shares of new stock, on account of which he is sued, never had any legal existence, and that he by virtue of his subscription in September, 1881, for thirty shares in the then proposed increase of capital from \$500,000 to \$1,000,000, and by his other acts, never became liable on account of the debts of the Pacific National Bank, beyond his liability as the holder of thirty shares of valid stock.

“2d. That, by his contribution, in January, 1882, of an amount equal to the par value of all the stock ever held by him towards the fund, which was all used in the payment of the debts of the bank, the bank then being insolvent, he in law discharged his liability as a stockholder in said bank, and should therefore have judgment in his favor.

“3d. As appellant in the suit in equity, Delano alleges, as ground for reversing the decree dismissing his bill, that the contribution made by him on January 23, 1882, of an amount equal to the par value of the stock held by him towards a fund which was actually used in the payment of the debts of the bank, the bank then being insolvent, constituted in equity a satisfaction and extinguishment of his liability as a stockholder for the debts of the bank, if not at law.”<sup>4</sup>

<sup>5</sup> *Delano v. Butler*, 118 U. S. 634, 635, 649, 30 L. ed. 260, 7 Sup. Ct. 39.

On the appeal the judgment below was affirmed, the court saying that the defendant paid for the new shares without waiting to see what the Comptroller would do, and with knowledge that the Comptroller could reduce the amount. Also that the conduct of the defendant was a ratification of the transactions he afterward sought to repudiate.

In this section<sup>1</sup> the words "and no increase of capital shall be valid until the whole amount of such increase be paid in", do not create a condition, express or implied, that shares, subscribed and paid for in full, are not to be held valid until the entire amount of the proposed increase is subscribed and paid for in full, but each subscription when paid in full, becomes valid and binding.<sup>5a</sup>

(d) **Reduction of Capital Stock.**<sup>5b</sup> — A national bank may reduce its capital stock,<sup>5c</sup> but cannot retain the proceeds of the stock so retired with the view of establishing a surplus fund, or indeed for any purpose whatsoever.<sup>6</sup>

§ 216. **Deposit of Bonds for Circulation.** — The court cannot, at suit of an individual, interfere with the action of the Comptroller in respect to the bonds. C. claimed title to the bonds deposited by a national bank, by assignment from the bank. The United States Treasurer and Comptroller would not recognize his claim; the Comptroller, on the contrary, appointed a receiver, and the bonds were to be sold to redeem the bank's circulation, the surplus to go to the general fund for creditors. The court *held*, on demurrer, that no relief could be granted against the Treasurer or Comptroller, and therefore none against the receiver. As the receiver would not come into possession of

<sup>5a</sup> *Scott v. Latimer*, 89 Fed. 843 (1898).

<sup>5b</sup> R. S. 5143. See § 13 b.

<sup>5c</sup> With the approval of the Comptroller, *Cogswell v. Norwich Second National Bank*, 78 Conn. 75, 60 Atl. 1059 (1905), affirmed in 204 U. S. 1, 51 L. ed. 343, 27 Sup. Ct. 241; *Cogswell v. Norwich Second National Bank*, 76 Conn. 252, 56 Atl. 574 (1903); and the Federal Reserve Board, Fed. Res. Act., Sec. 28, § 197.

<sup>6</sup> *Seeley v. New York Exchange National Bank, Thompson's National Bank Cas.* 804.

When the capital stock of a national bank is reduced beyond the amount required to meet an impairment of capital and the reduction is made by charging off doubtful assets to the amount of the reduction, the stockholders of record at the time of the reduction are entitled to the assets then set free and they may be set aside for them as a trust fund, and subsequent transferees of the stock have no interest in such fund. *Jerome v. Cogswell*, 204 U. S. 1, 51 L. ed. 343, 27 Sup. Ct. 241 (1907), affirming 78 Conn. 75, 60 Atl. 1059.

the proceeds of the bonds, he had no interest in the suit in any way.<sup>1</sup>

§ 228. **Mortgages of Real Estate to Bank.**<sup>1</sup>—(a) The act of 1864, §§ 8 and 28, prohibits a national bank from loaning money upon any other than personal security.<sup>1a</sup> A mortgage can be taken as security only for a debt “previously contracted”, not for a debt simultaneously contracted, nor for debts to be thereafter contracted. A mortgage taken in contravention of these restrictions is illegal and void,<sup>2</sup> and injunction will issue to prevent foreclosure by the bank;<sup>3</sup> though as security for a pre-existing debt it is unquestionably good.<sup>4</sup> A person having made a mortgage to a bank to secure future advances, and having subsequently made an assignment for the benefit of creditors, it was held that the bank had acted *ultra vires*, and that the assignee might set up the consequent invalidity of the mortgage. The plaintiff, it was said, cannot state its case without showing that it has broken the law, and stating itself out of court.<sup>5</sup>

Where, however, in one and the same mortgage, debts previously contracted, and also debts simultaneously contracted,

<sup>1</sup> § 216. *Van Antwerp v. Hulburd*, 7 Blatchf. 426.

<sup>1a</sup> § 228. R. S. 5137. See §§ 8, 28; I. §§ 74-76.

<sup>1a</sup> See *First National Bank v. Messner*, 25 N. D. 263, 141 N. W. 999 (1913); *First National Bank v. American National Bank*, 173 Mo. 153, 72 S. W. 1059 (1903); *Commercial National Bank v. First National Bank*, 97 Tex. 536, 80 S. W. 601, 104 Am. St. Rep. 879 (1904).

<sup>2</sup> *Kansas Valley National Bank of Topeka v. Rowell*, 2 Dillon (C. C.) 371; *Allen v. First National Bank of Xenia*, 23 Ohio St. 97. But see *Spafford v. First National Bank of Tama City*, 37 Iowa 181.

In *Barron v. McKinnon*, 196 Fed. 933 (1912), the court say that the supreme court has held in several cases that a conveyance of real estate to a national bank in violation of the prohibition contained in this section is not void but only voidable; and in *Schuyler National Bank v. Gadsden*, 191 U. S. 451, 48 L. ed. 258, 24 Sup. Ct. 129 (1903), the court, citing *Logan County National Bank v. Townsend*, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. 496, which quotes from *Union National Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188, say: “now it is no longer open to controversy that the provisions of the statutes of the United States forbidding the taking of real estate securities by a national bank for a debt coincidentally contracted do not operate to make the security void, and thus enable the individual who has contracted with the bank to defeat recovery, but simply subjects the bank to be called to account by the government for exceeding its powers.” See also *First National Bank v. Messner*, 25 N. D. 263, 141 N. W. 999 (1913).

<sup>3</sup> *Matthews v. Skinker*, 62 Mo. 329; *Woods v. People's National Bank of Pittsburg*, 83 Pa. St. 57; *Crocker v. Whitney*, *Thompson's National Bank Cas.* 745.

<sup>4</sup> *Woods v. People's National Bank of Pittsburg*, 83 Pa. St. 57.

<sup>5</sup> *Fowler v. Scully*, 72 Pa. St. 456.

or to be afterward contracted, are alike secured, if the line separating the good from the bad be plain, then the consideration will be divisible, and the mortgage will be void only for so much as is illegal, and will be valid for the rest.<sup>6</sup>

Though a national bank cannot lend money upon security of real estate, yet where a bank lent money and took as security an assignment of a mortgage, the borrower being already indebted to the bank in other unsecured indebtedness, and an oral agreement being made whereby the bank was permitted to hold this mortgage for the security of the prior indebtedness as well as of the newly incurred loan, the transaction was upheld as valid under the statute.<sup>7</sup>

A national bank took, as security for a previous debt, a mortgage on certain real estate on which there existed a prior lien. A part of this prior lien becoming due, the bank, in order to protect and save its own lien, paid what was due, and took another mortgage note to secure the amount. The taking of this second mortgage was held to be no violation of the National Banking Law, as the bank had a right to get all the security it could for such money as it was obliged to pay out.<sup>8</sup>

(b) A national bank, in selling and conveying real estate, may lawfully take and hold a mortgage thereon as security for the payment of the purchase money.<sup>9</sup>

Where it appears that a national bank has received an assignment of certain notes and mortgage securities as collateral for a debt, there is no presumption that the debt and assignment were contemporaneous, and that the assignment was consequently in violation of the statute, and void. But the facts which would constitute the illegality must be positively proved by the party seeking to rely thereon.<sup>10</sup>

The power of a national bank to take a mortgage of real estate executed in good faith, to secure pre-existing indebtedness, is not affected by the fact that, at the same time, an old note representing the debt is taken up, and a new one given, with an agreement for periodical renewals.<sup>11</sup>

<sup>6</sup> *Kansas Valley National Bank v. Rowell*, 2 Dillon (C. C.) 371; *Allen v. First National Bank of Xenia*, 23 Ohio St. 97.

<sup>7</sup> *Upton v. National Bank of South Reading*, 120 Mass. 153.

<sup>8</sup> *Ornn v. Merchants' National Bank*, 16 Kan. 341.

<sup>9</sup> *New Orleans National Bank v. Raymond*, 29 La. Ann. 355.

<sup>10</sup> *Richards v. Kountze*, 4 Neb. 200.

<sup>11</sup> *Howard National Bank of Burlington v. Loomis*, 51 Vt. 349.



Under U. S. Rev. Sts. § 5136, a national bank may take, hold, and sue upon coupons attached to a town bond;<sup>12</sup> and under the Federal Reserve Act<sup>12a</sup> a national bank not situated in a central reserve city is authorized to loan on farm lands.

A firm, to secure a loan from a national bank, assigned to it a promissory note, and the trust deed of lands that had been executed to the firm to secure it. Upon a bill brought by the maker to enjoin the trustee's sale for nonpayment, on the ground that, under U. S. Rev. Sts. §§ 5136, 5137, the deed did not inure as a security at the time of the assignment, *held*, that the bank was entitled to enforce collection by sale of the lands.<sup>13</sup> (A leading case.)

In 1866, a company borrowed of a national bank \$10,000, where-with to complete their hotel, giving as security a deed of trust on the property, and then employed W., a builder, to complete the building, contracting to give him a deed of trust upon it, subject to the first lien, to secure any balance due him on its completion. The company, out of the \$10,000, paid W. \$8000, leaving due him, when the work was completed, \$5791. The contractor knew about the deed of trust, and where the money came from; and therefore the court held him equitably estopped to object to the deed of trust, having received the money obtained by it. He had recorded the contract to secure the mechanic's lien, and, January 1, 1867, the company conveyed the property, subject to the lien of the first deed, in trust to secure said balance. *Held*, (1) that such loan by the bank was not prohibited by U. S. Rev. Sts. §§ 5136, 5137, and even had there been a prohibition of such deed of trust, it could not be avoided by the borrower, or his creditors; (2) that W. was estopped from claiming against the trust deed; (3) that W.'s mechanic's lien was subordinate to the lien of the bank under the deed, and the latter was not confined to the property as it was when the deed was made.<sup>14</sup>

(c) A national bank may acquire title to real estate, even though encumbered, if honestly done for the purpose of securing a debt due it, and it may do this by taking a conveyance directly, or by sale under process of law. If the purpose is to speculate in real estate under the form or pretence of obtaining satisfaction

<sup>12</sup> *First National Bank of North Bennington v. Bennington*, 16 Blatchf. 53; compare *Lyons v. Lyons National Bank*, 19 Blatchf. 279.

<sup>12a</sup> Fed. Res. Act, Sec. 24, § 192.

<sup>13</sup> *Union National Bank of St. Louis v. Matthews*, 98 U. S. 627, 25 L. ed. 190.

<sup>14</sup> *Wroten v. Armat*, 31 Gratt. (Va.), 228.

of a previous debt, it is forbidden by law. Where commission merchants in St. Louis were indebted to a national bank in the sum of \$6500, on drafts drawn on them and accepted, which the bank had discounted in its usual course of business, and to secure such indebtedness transferred to the bank a note of \$20,000 on another party, secured by deed of trust upon real estate, subject to further liens, and such other party made a deed of the property to the bank in payment of the sum due him, the bank agreeing to discharge the other liens on the same, *held*, that the transaction was not forbidden by either the letter or the spirit of the National Banking Act.<sup>15</sup>

A married woman indorsed on a note, "I hereby charge my separate and personal estate with the payment of the within note." It was argued that this was a mortgage, and void; but the court said, that no property was conveyed, and the only effect of the indorsement was to create a liability that could be enforced as if she were not married out of any property which would be liable to execution, whether she had it at the time of making the indorsement or acquired it afterward. It would not be necessary to go to equity, nor would the charge be enforced as a lien, but by a common law action in which a personal judgment would be rendered; it is therefore personal security within the meaning of the banking law.<sup>16</sup>

If the debt is owed, the fact that *new* notes are given for it at the time of the mortgage does not affect the validity of the transaction.<sup>17</sup>

The fact that a national bank, at a judgment sale of real estate mortgaged to it, purchased the mortgaged property, and also other property not secured by the mortgage, does not invalidate the title to the mortgaged property which § 5137 of U. S. Rev. Sts. authorizes the bank to acquire.<sup>18</sup>

The taking, by a national bank, of the stock of a corporation as collateral security for a loan of money does not violate the prohibition of loaning upon mortgage of real estate, although the property of such borrower consists wholly of real estate.<sup>19</sup>

A national bank may make loans and take corporate stock as collateral security in the usual course of business, and may enforce

<sup>15</sup> *Mapes v. Scott*, 88 Ill. 352.

<sup>16</sup> *Third National Bank v. Blake*, 73 N. Y. 260.

<sup>17</sup> *Farmers & Merchants' Bank v. Wallace*, 45 Ohio St. 152.

<sup>18</sup> *Reynolds v. First National Bank of Crawfordsville*, 112 U. S. 405, 28 L. ed. 733, 5 Sup. Ct. 213.

<sup>19</sup> *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. 261.

its right of ownership in the stock even though it was not authorized to deal in stocks.<sup>19a</sup>

Mortgages given to a national bank to secure contemporaneous loans by discounting commercial paper in the usual course of business are not void under U. S. Rev. Sts. §§ 5136, 5137; they are only voidable. The Government alone can object.<sup>20</sup> See *ultra vires*, § 722.

The power of a national bank to *bona fide* purchase such real estate as is necessary for its accommodation in the transaction of its business includes the power to lease property whereon to erect buildings suitable to its wants, and even though the lease is assignable only by consent of the lessor it is not invalid because its term outlasts the life of the bank or because the gross rent to be paid therefor exceeds the indebtedness it is authorized to contract.<sup>21</sup>

A national bank which lawfully holds uplands and so has a valuable privilege which is a part of and appurtenant to the uplands may purchase the tide lands.<sup>22</sup>

§ 229. **Excessive and Unauthorized Loans.**<sup>1</sup>—Section 29 of the National Banking Act forbids any bank to lend to any one person, company, etc., a sum greater than one tenth part of the capital stock of the bank.<sup>1a</sup> Where this restriction had been broken, and a greater amount had been unlawfully lent by a bank, it was held that this element of illegality did not avoid the contract, nor enable the debtor when sued for recovery of the loan to escape payment in full.<sup>2</sup> The statute is intended only as a rule for the government of the bank; and an indorser on a note discounted by a bank for the maker, when the maker is already over-indebted to the bank, cannot escape liability on this

<sup>19a</sup> *Corn Exchange National Bank v. Kaiser*, 160 Wis. 199, 151 N. W. 259 (1915).

<sup>20</sup> *Graham v. National Bank of the State of New York*, 32 N. J. Eq. 804; *Schuyler National Bank v. Gadsden*, 191 U. S. 451, 48 L. ed. 258, 24 Sup. Ct. 129 (1903).

<sup>21</sup> *Weeks v. International Trust Co.*, 125 Fed. 370 (1903). *Brown v. Schleier*, 194 U. S. 18, 48 L. ed. 857, 24 Sup. Ct. 558 (1904), affirming 118 Fed. 981 (1902).

<sup>22</sup> *Schofield v. Baker*, 212 Fed. 504 (1914).

<sup>1</sup> § 229. R. S. 5200. See § 29.

<sup>1a</sup> If the loan exceeds the statutory amount it may be taken advantage of only by the government. *Maryland Trust Co. v. National Mechanics' Bank*, 102 Md. 608, 63 Atl. 70 (1906).

<sup>2</sup> *Union Gold Hill Mining Co. v. Rocky Mountain National Bank*, 96 U. S. 640, 24 L. ed. 648; *Shoemaker v. National Mechanics' Bank*, 2 Abb. (U. S.) 416; *Stewart v. National Union Bank of Maryland*, *id.*, 424; *Mills County National Bank v. Perry*, 72 Iowa 15, 38 N. W. 341.

ground.<sup>3</sup> And the maker of a note given to a bank and to others to be turned in to the bank so as to make it appear that the loan has not exceeded the statutory limit of loan, even though it is considered as an accommodation note, cannot set up a defence when sued by the receiver of the insolvent bank.<sup>3a</sup>

Where a national bank had made a loan in excess of the amount which was lawful, but upon which partial payments have been made, whereby the balance was reduced within the legal limit, it was *held*, in a suit upon a promissory note given for such balance, that the illegality of the original loan could not be availed of in defence.<sup>4</sup>

Where one who knew that a national bank was financing the building of a dredge and that the amount needed was more than one tenth of its capital stock, authorized the mortgaging of one's interest in the dredge to secure the money, one cannot object to the mortgage executed to the bank for advancements in excess of what it is authorized to loan.<sup>4a</sup>

If a national bank makes a loan which is unlawful under the statute, and takes collateral security therefor, the borrower cannot, by reason of the illegality, maintain a bill in equity to have the bank enjoined from parting with the securities, the loan remaining still unpaid.<sup>5</sup>

That a loan by a national bank is in excess of the legal limit, cannot be set up to defeat securities given for it. <sup>6</sup>

No one except the government can take advantage of a violation of U. S. Rev. Sts. § 5200, which prohibits loans beyond ten per cent of its capital to any one person.<sup>7</sup> The only penalty, if any, for a violation of this section is a forfeiture of the bank's charter as provided by U. S. Rev. Sts. § 5239.<sup>8</sup>

### § 230. Interest and Usury <sup>0</sup>

We will condense the law of this topic as decided by the cases referred to in the following notes. The small letters refer to the divisions of this section 230.

<sup>3</sup> O'Hare v. Second National Bank of Titusville, 77 Pa. St. 96.

<sup>3a</sup> Murphy v. Gumaer, 18 Colo. App. 183, 70 Pac. 800 (1902).

<sup>4</sup> Allen v. First National Bank of Xenia, 23 Ohio St. 97.

<sup>4a</sup> The Seattle, 170 Fed. 284 (1909).

<sup>5</sup> Elder v. First National Bank of Ottawa, 12 Kan. 128.

<sup>6</sup> National Bank v. Perry, 72 Iowa 15, 33 N. W. 341.

<sup>7</sup> Maryland Trust Co. v. National Mechanics' Bank, 102 Md. 608, 63 Atl. 70.

<sup>8</sup> The Seattle, 170 Fed. 284 (1909).

<sup>0</sup> § 230. R. S. 5197, 5198. See § 30.

What interest may be taken.

- (1) If the laws of the State in which a national bank is located limit the rate of interest, the bank may take as high interest as said laws allow to individuals generally, and where one rate is allowed for persons generally, and another is prescribed for banks of issue a national bank may take either standard.

If it is more than the usual rate, national banks may avail themselves of it. § 230.

If it is less than the rate allowed to private parties, national banks will labor under the same disadvantage. (a)

Permitting a few *specified State banks* to take a rate of interest higher than the general law allows, will not privilege national banks. § 230.

- (2) Where the laws of the locus do not fix the rate of interest, seven per cent is the limit allowed national banks. §§ 30, 230 c.

Consequences of taking or stipulating for usurious interest.

- (1) The interest-bearing power of the obligation is destroyed *forever* (b, c), and the taint survives through all transformations and renewals, so long as the *obligor remains the same*. (l)

But the note or other obligation itself is not void. The bank may sue upon it, and the surety is bound (c, g, i) to the same extent as the maker. The real principal lent can be recovered, and no more (d), and any interest that has been paid on the note sued on, or those to which it is a renewal, is to be applied on the principal. (a, b, d, k) *Contra* as to the interest on a series of renewal notes. (i, k)

- (2) The violation of law is a cause of forfeiture. § 53.

- (3) A penalty is incurred equal to double the whole amount of interest actually paid within two years preceding suit brought. (a)

- (x) The right to sue for this penalty accrues as soon as interest has been paid, whether the debt is paid or not. (i)

But only the party who actually had the usurious transaction with the bank, or his legal representatives, [which include his assignee in bankruptcy (a, b) and the receiver of an insolvent corporation (n),] can take advantage of the penalty. (a)

- (y) This annihilation of interest-bearing power and this penalty to be recovered precisely as the statute provides are exclusive of all other consequences as between the parties. (c, e, f, h, j, k)

State laws against usury have no application to national banks. (c, e, j)

There can be no set-off of the claim for the penalty in a suit brought by the bank on the note; this claim does not arise from contract, but the interest paid may be applied on the principal. (f, h, j, l)

- (z) State courts have jurisdiction of suits to recover this penalty (a, h), *contra* (d), unless the bank is located in another State. (b)

- (4) If the debtor comes into equity for relief, he must pay *the debt with legal interest*. (c)

The *Statute of Limitations* runs against the right to recover the penalty from the time the interest is paid, but it does not run at all against the right to set up the *defence* of usury to keep the bank from recovering more than the actual amount lent, in any suit by it on the obligation. The destruction of interest-bearing power is not affected by lapse of time. (g, l)

Under section 30 of the act of 1864, national banks may charge such rate of interest as is allowed by the State to natural persons generally, and a higher rate if State banks of issue are authorized by State laws to take a higher rate.<sup>0</sup> "National banks have been national favorites", and this, with other provisions, is designed to protect and encourage them, to save them from unfriendly State legislation, and from ruinous competition on the part of State banks. Nay, more, "State banks have been substantially taxed out of existence" by the acts of Congress, and the purpose is manifest to compel a withdrawal of the issues of all State banks from circulation.<sup>1</sup>

Where, by the statute laws of a State, banks are allowed to charge a usurious rate of interest, provided the amount of the excess of interest was evidenced by a memorandum signed by the party to be charged, a national bank located in the State may discount notes and charge thereon usurious interest in advance without any other special memorandum.<sup>2</sup>

But it has been held that a national bank is not justified in charging an usurious rate of interest because the statutes of the State wherein it is located, permit usurious interest to be taken only by certain specified banks.<sup>3</sup>

If no rate of interest is established by the laws of the State wherein the bank is located, section 30 of the National Banking Act prohibits a national bank from charging interest at a greater rate than seven per cent per annum. This, also, is the law when the bank is located in a State which by its statute laws expressly forbids a corporation to interpose the defence of usury to any action.<sup>4</sup> But by statute, in California, any rate agreed upon may be charged by a national bank.<sup>4a</sup>

It is now conclusively settled, in spite of the contrary decision of the Court of Appeals of New York,<sup>5</sup> that the penalty declared

<sup>0</sup> See *Citizens' National Bank v. Donnell*, 712 Mo. 384, 72 S. W. 925 (1903), affirmed in 195 U. S. 369, 49 L. ed. 238, 25 Sup. Ct. 49; *McCarthy v. First National Bank*, 23 S. D. 269, 121 N. W. 853, 23 L. R. A. (N. S.) 335 (1909).

<sup>1</sup> *Tiffany v. National Bank of Missouri*, 18 Wall. 409, 21 L. ed. 862; *National Bank v. Brulin & Williams*, 64 Tex. 571; *Wolverton v. Exchange National Bank*, 77 Wash. 94.

<sup>2</sup> *Newell v. National Bank of Somerset*, 12 Bush (Ky.) 57.

<sup>3</sup> *Duncan v. First National Bank of Mount Pleasant*, 11 Bank. Mag. (N. Y. 3d Series), 787; *Thompson's National Bank Cas.* 360.

<sup>4</sup> *In re Wild*, 11 Blatchf. 243.

<sup>4a</sup> *California National Bank v. Ginity*, 108 Cal. 148, 41 Pac. 38.

<sup>5</sup> *First National Bank of Whitehall v. Lamb*, 50 N. Y. 100. In the lower courts of New York a contrary doctrine has often been expressed; see, for example, this same case, 57 Barb. (N. Y.) 429.

in this section for the exaction by a national banking association of usurious interest is superior to, and exclusive of, any penalty established by State legislation.<sup>6</sup>

(a) Under the same section it has been held in Ohio that, if in the State where the bank is situated one rate of interest is allowed by law generally and a less rate is allowed for banks of issue organized under the State laws, a national banking association can charge only the latter and less rate.<sup>7</sup> But this case was founded on a statute subsequently repealed. A later case holds that since the repeal of the statute a national bank may charge as high as eight per cent interest.<sup>7a</sup> And in Colorado if one rate is prescribed for banks of issue and another for persons generally, a national bank may choose either rate.<sup>7b</sup>

It has been held that, in case of the payment<sup>7c</sup> of usurious interest having been made, the recovery provided by the statute should be of double the whole amount of interest paid, and not merely of double the amount in excess of the legal rate; also that the action to recover this penalty may be maintained by the assignee of a bankrupt, where the payment had been made by the bankrupt before bankruptcy.<sup>8</sup>

The statute does not apply to the voluntary payments of debts of third persons. *First National Bank v. Davis*, 135 Ga. 687, 70 S. E. 246, 36 L. R. A. (N. S.) 134 (1911). See *Lasater v. First National Bank*, 96 Tex. 345, 72 S. W. 1057 (1903).

<sup>6</sup> *Farmers & Mechanics' National Bank v. Dearing*, 91 U. S. 29, 23 L. ed. 196; *Brown v. Second National Bank of Erie*, 72 Pa. St. 209; *First National Bank of Columbus v. Garlinghouse*, 22 Ohio St. 492; *Wiley v. Starbuck*, 44 Ind. 298; *Central National Bank of New York v. Pratt*, 115 Mass. 539; *Davis v. Randall*, *id.*, 547; *Lucas v. Government National Bank of Pottsville*, 78 Pa. St. 228; *First National Bank v. Barnett*, 51 Neb. 397, 70 N. W. 937; *Merchants' National Bank v. Sharkey*, 64 Or. 32, 128 Pac. 1005 (1913); *Haseltine v. Central National Bank*, 183 U. S. 132, 46 L. ed. 117, 22 Sup. Ct. 49 (1901); *First National Bank v. McCarthy*, 18 S. D. 218, 100 N. W. 14 (1904).

<sup>7</sup> *Shunk v. First National Bank of Galion*, 22 Ohio St. 508.

<sup>7a</sup> *La Dow v. Bank*, 51 Ohio St. 234, 37 N. E. 11.

<sup>7b</sup> *Rockwell v. Bank*, 4 Colo. App. 562, 36 Pac. 905.

<sup>7c</sup> Payment may be made in property rather than money if the parties so intend. *First National Bank v. Davis*, 135 Ga. 687, 70 S. E. 246, 36 L. R. A. (N. S.) 134, n. (1911). But actual payment in some form is necessary. *Talbot v. First National Bank*, 185 U. S. 172, 46 L. ed. 857, 22 Sup. Ct. 612 (1902); *First National Bank v. Clark*, 161 Ala. 497, 49 So. 807 (1909); *First National Bank v. Lasater*, 196 U. S. 115, 49 L. ed. 408, 25 Sup. Ct. 206 (1905); *McCarthy v. First National Bank*, 223 U. S. 493, 56 L. ed. 523, 32 Sup. Ct. 240 (1911).

<sup>8</sup> *Crocker v. First National Bank of Chetopa* (U. S. C. C., per Dillon, J.), 11 Am. Law. Rev. 169; 3 Am. Law Times Rep. (U. S.) 350; *Thompson's*

The party entitled to recover may have judgment for twice the amount of all interest which he has paid within two years next preceding the date of the institution of the suit.<sup>9</sup>

It seems that the action to recover the penalty is in the nature of an action of debt<sup>9a</sup> and that this remedy is exclusive of all others.<sup>9b</sup>

Where a national bank has discounted a note, charging more than the legal rate of interest, it can only recover the amount of the note minus the interest charged. If the note is renewed on the same terms, and the usurious interest is paid in advance, the bank can only recover the face of the note less double the amount of interest paid on renewal, or else the borrower may recover by action of debt double the amount of interest paid on renewal.<sup>10</sup> Apparently the judge did not mean exactly what he said in this case; for he remarked that the result would be the same in both instances. He probably forgot that, in discounting, the note is given for the full sum, and the bank only pays over that sum less the interest. He appears to have thought that the note would be given for the balance of the sum after

National Bank Cas. 317; *Schuyler National Bank v. Bollong*, 28 Neb. 684, 45 N. W. 164; *National Bank v. Johnson*, 91 Ky. 181, 15 S. W. 134; *Henderson National Bank v. Alves, Assignee*, 91 Ky. 146, 15 S. W. 132; *Talbot v. First National Bank*, 185 U. S. 172, 46 L. ed. 857, 22 Sup. Ct. 612 (1902); *McCarthy v. First National Bank*, 23 S. D. 269, 121 N. W. 853, 23 L. R. A. (n. s.) 335 (1909); *Meredith v. American National Bank*, 127 Tenn. 90, 153 S. W. 479 (1913); *Lake Benton First National Bank v. Watt*, 184 U. S. 151, 46 L. ed. 475, 22 Sup. Ct. 457 (1902).

*Contra.* *Bobo v. People's National Bank*, 92 Tenn. 451, 21 S. W. 888, where it is held that twice the excess reserved or paid over the legal interest is the proper measure — not twice the entire interest reserved and paid. But see *First National Bank v. Hunter*, 109 Tenn. 91, 70 S. W. 371 (1902).

<sup>9</sup> *Hintermisher v. First National Bank*, 64 N. Y. 212; and *Crocker v. First National Bank*, *supra*. See also *Shinkle v. First National Bank of Ripley*, 22 Ohio St. 516; *Norfolk National Bank v. Schwenk*, 46 Neb. 381, 64 N. W. 1073; *First National Bank v. Davis*, 135 Ga. 687, 70 S. E. 246, 36 L. R. A. (n. s.) 134, n. (1911); *Farmers' National Bank v. McCoy*, 42 Okla. 420, 141 Pac. 792 (1914); *Merchants' etc. National Bank v. Horton*, 27 Okla. 689, 117 Pac. 201 (1911).

<sup>9a</sup> *Talbot v. First National Bank*, 185 U. S. 172, 46 L. ed. 857, 22 Sup. Ct. 612 (1902).

<sup>9b</sup> *Haseltine v. Central National Bank*, 183 U. S. 132, 46 L. ed. 118, 22 Sup. Ct. 50 (1901); *Schlesinger v. Gilhooly*, 189 N. Y. 1, 81 N. E. 619 (1907).

<sup>10</sup> *National Bank of Madison v. Davis*, 6 Cent. Law Jour. 106; *Thompson's National Bank Cas.* 350; *Brown v. Second National Bank of Erie*, 72 Pa. St. 209.



deduction of the interest, so that a subsequent deduction would have a double effect. (See below, *d.*)

Where a national bank has received a usurious rate of interest, advantage may not be taken of it by way of counter claim to an action brought by the bank more than two years subsequent to the receipt of the illegal interest. Demurrer will lie to such a counter claim.<sup>11</sup> (See below, *g.*)

If a national bank purchases business paper from a person who is the holder and owner, but not the maker thereof, at a usurious rate of discount or interest, the penalty given by the statute may be recovered from the bank only by the party who had the transaction with the bank, or his legal representatives. The maker of the paper cannot avail himself of it in any shape. He is entirely outside of the transaction of bargain and sale, which has no bearing or effect upon his rights, duties, or liabilities.<sup>12</sup>

A State court has jurisdiction of actions against a national bank to recover the penalty imposed by the laws of the United States for taking a usurious rate of interest.<sup>13</sup>

(*b*) In Illinois it has been said that an action brought against a national bank for the penalty for the taking of usurious interest is not within the jurisdiction of a State court, when the bank is located in another State.<sup>14</sup>

Where a national bank takes an excessive rate of interest, the usuriousness of the transaction is not determined, nor does the Statute of Limitations begin to run, prior to the time of final payment or of entering judgment.<sup>15</sup>

But it seems, on the other hand, that a transaction once usurious is always usurious.<sup>15a</sup> For it has been said that, where a national

<sup>11</sup> *National State Bank of Newark v. Boylan*, 2 Abb. N. Cas. (N. Y.) 216; *Higley v. First National Bank of Beverly*, 26 Ohio St. 75; *Montgomery v. Albion National Bank*, 50 Neb. 652, 70 N. W. 239.

<sup>12</sup> *Smith v. Exchange Bank of Pittsburg*, 26 Ohio St. 141.

<sup>13</sup> *Ordway v. Central National Bank*, 47 Md. 217.

<sup>14</sup> *Missouri River Telegraph Co. v. First National Bank of Sioux City*, 74 Ill. 217.

<sup>15</sup> *Duncan v. First National Bank of Mount Pleasant*, 11 Bank. Mag. (N. Y. 3d Series) 787; *Thompson's National Bank Cas.* 360.

Deductions by way of discount when the bank makes the loan are not treated as payments and there is no usurious transaction. But when a payment is actually made as interest and the bank knowingly receives and appropriates it as such the usurious transaction is complete, the right of the debtor and the liability of the bank are fixed, the cause of action arises and the statute of limitations begin to run. *McCarthy v. First National Bank*, 223 U. S. 493, 56 L. ed. 523, 32 Sup. Ct. 240 (1911).

<sup>15a</sup> There is no *locus penitentiae* after the interest has been knowingly

bank charges and receives an illegal rate of interest, "the illegal act destroys the interest-bearing power of the obligation, and as there can be no point in the history of such paper at which it is freed from the taint of illegality, so it follows there can be no point of time from which it can bear interest."<sup>16</sup>

To the same principle is also to be referred another Pennsylvania case, in which the court say: "It is clear, then, as to the national banks, that, whenever they charge or stipulate for an illegal rate, all payment of interest, and not merely the excess, is illegal." Consequently, it is *held*, that when a national bank institutes proceedings to recover its debt on the last of a series of renewal notes, the party to whom the loans have been made is entitled to credit for the entire interest paid by him, and not merely to the excess over and above the legal rate.<sup>17</sup>

A national bank received upon a promissory note interest at a rate greater than that allowed in the State where the note was made, thereby violating U. S. Rev. Sts. § 5197. In an action by the bank upon the note, *held*, that this could not be availed of in set-off against the amount due upon the note; but that what the bank was entitled to recover was only, and precisely, the sum named on the face of the note, without interest.<sup>18</sup>

A claim under this section for double the amount of excess in interest passes to the assignee in bankruptcy.<sup>19</sup>

(c) The discounting of a note by a national bank at a usurious rate only avoids the interest, not the note. State statutes concerning usury have no application to national banks. On a usurious note the surety is bound to the same extent as is the maker.<sup>20</sup>

appropriated. Such privilege is granted only to those banks which, having charged usury, may, by a refusal to accept interest when tendered, show that they will not carry the illegal contract into execution. *McCarthy v. First National Bank*, 223 U. S. 493, 56 L. ed. 523, 32 Sup. Ct. 240 (1911).

<sup>16</sup> *Lucas v. Government National Bank of Pottsville*, 78 Pa. St. 228; *Thomas McGhee v. First National Bank*, 40 Neb. 92, 58 N. W. 537.

<sup>17</sup> *Overholt v. National Bank of Mount Pleasant*, 82 Pa. St. 490; *Cake v. First National Bank of Lebanon*, *Thompson's National Bank Cas.* 890; *Stephens v. Monongahela National Bank*, 88 Pa. St. 157.

<sup>18</sup> *First National Bank of Peterborough v. Childs*, 133 Mass. 248; *Marion National Bank v. Thompson*, 19 Ky. Law Rep. 436, 40 S. W. 903; *National Bank v. Grimes*, 49 Kan. 219, 30 Pac. 474.

<sup>19</sup> *Wright v. First National Bank of Greensburg*, 18 Alb. Law Jour. 115; *Tiffany v. National Bank*, 18 Wall. 409, 21 L. ed. 862.

<sup>20</sup> *First National Bank of Columbus v. Garlinghouse*, 22 Ohio St. 492; *National Bank of Auburn v. Lewis*, 75 N. Y. 516; *First National Bank v. Stauffer*, 1 Fed. 187.

The provisions of §§ 5197, 5198, supersede the State laws upon that subject.<sup>21</sup>

If the president of a bank individually agrees with a party on his application to loan him \$600 for one year, and to know on what terms he can get it on his note for that amount satisfactorily indorsed, to let him have it at twelve per cent, and when the note is presented takes it and gives him a check for \$564, the contract will be usurious and void as against the indorser, although the bank had no other knowledge as to the transaction than that possessed by the president.<sup>22</sup>

A national bank discounting business paper at a greater rate than seven per cent is liable to the forfeiture of double the excess over seven per cent, imposed by the act, although the excess is not usurious under the State law.<sup>23</sup>

The knowingly <sup>23a</sup> taking or receiving by a national bank of a greater rate of interest than is allowed by the State in which the bank is located is, under the act, usurious.

The compounding semi-annually by a national bank of the interest on a note when the statute says that it shall not be compounded oftener than once a year is usurious, and when any item of an account becomes tainted with usury it infects the entire transaction from that time.<sup>23b</sup>

If a State bank discounts a note before maturity in due course of business without notice that it was void for usury between the original parties it is enforceable by said bank.<sup>23c</sup>

The forfeiture is of the entire interest,<sup>24</sup> even though the total

<sup>21</sup> *Davis v. Randall*, 115 Mass. 547; *First National Bank v. Barnett*, 51 Neb. 397, 70 N. W. 937; *Slaughter v. First National Bank*, 109 Ala. 157, 19 So. 430.

<sup>22</sup> *Newport National Bank v. Tweed*, 4 Houston (Del.) 225; *Pickett v. Merchants' National Bank of Memphis*, 32 Ark. 346; *Wheeler v. National Bank*, 96 U. S. 268, 24 L. ed. 833.

When an agent is allowed by a State (Nebraska) to take security in his own name for the benefit of a principal, it follows that the taking of real estate security by the president of a bank in his own name for the benefit of the bank is in legal effect the taking of security by the bank itself. *Schuyler National Bank v. Gadsden*, 191 U. S. 427, 48 L. ed. 258, 24 Sup. Ct. 129 (1903).

<sup>23</sup> *Johnson v. National Bank of Gloversville*, 74 N. Y. 329.

<sup>23a</sup> *Garfinkle v. Bank of Charleston*, 79 S. C. 404, 60 S. E. 942 (1907).

<sup>23b</sup> *Citizens' National Bank v. Donnell*, 172 Mo. 384, 72 S. W. 925 (1903), affirmed in 195 U. S. 369, 49 L. ed. 238, 25 Sup. Ct. 49 (1904).

<sup>23c</sup> *Schlesinger v. Gilhooly*, 189 N. Y. 1, 81 N. E. 619 (1907).

<sup>24</sup> *Hall v. Bank*, 30 Neb. 99, 46 N. W. 150; *National State Bank v. Brainard*, 61 Hun (N. Y.) 339. See *Citizens' National Bank v. Donnell*,

interest is less than the maximum rate permitted by the State and which legally could have been agreed upon.<sup>24a</sup> The State courts have jurisdiction of cases arising under the act. When the usury, even by the consent of the debtor, is carried into the general account, the whole contract is tainted,<sup>24b</sup> although a note be afterwards given for the amount found due. Where a third party assumes the debt, and the amount he assumes is agreed upon, he cannot set up the usury. But if the amount is undetermined, he may do so. If the debtor comes into a court of equity for relief, he must pay the debt with legal interest.<sup>25</sup>

(d) If usury be pleaded in an action brought by a national bank upon a note,<sup>25a</sup> and it appears that the usury was taken out of the proceeds of the note, the bank will recover the face of the note, less the sums retained.<sup>25b</sup> But if, upon a renewal of such a note, the borrower had paid the usurious interest out of other moneys, the defendant may recoup double the amount of interest actually paid, or may recover the same amount in an independent action.<sup>26</sup>

195 U. S. 369, 49 L. ed. 238, 25 Sup. Ct. 49 (1904); *First National Bank v. Clark*, 161 Ala. 497, 49 So. 807 (1909); *Second National Bank v. Fitzpatrick*, 111 Ky. 228, 63 S. W. 459, 62 L. R. A. 599 (1901); *McCarthy v. First National Bank*, 23 S. D. 269, 121 N. W. 853, 23 L. R. A. (n. s.) 335 (1909); *First National Bank v. McCarthy*, 18 S. D. 218, 100 N. W. 14 (1904).

But from the commencement of suit by the bank for the principal debt, the legal rate of interest may be recovered. *Merchants' National Bank v. Sharkey*, 64 Or. 32, 128 Pac. 1005 (1913).

<sup>24a</sup> *Citizens' National Bank v. Donnell*, *supra*.

<sup>24b</sup> *Citizens' National Bank v. Donnell*, *supra*.

<sup>25</sup> *Pickett v. Merchants' National Bank of Memphis*, 32 Ark. 346.

<sup>25a</sup> The bank cannot then avoid the forfeiture imposed by U. S. Rev. Sts. § 5198, in absolute terms, by declaring an election to remit the excessive interest. *Citizens' National Bank v. Donnell*, *supra*.

<sup>25b</sup> See *McCarthy v. First National Bank*, 223 U. S. 493, 56 L. ed. 523, 32 Sup. Ct. 240 (1911).

When a note on its face or in fact carries usurious interest a defendant may interpose the plea of usury and thereby reduce recovery by the amount of the usurious interest carried in the note. *National Bank v. Lynch*, 69 W. Va. 333, 71 S. E. 389 (1911).

<sup>26</sup> *National Bank of Madison v. Davis*, 10 Chic. Leg. News, 156 (U. S. C. C., D. Ind.); s. c. 6 Cent. Law Jour. 106; *National Exchange Bank v. Moore*, 2 Bond 170; *Cheek v. Merchants' National Bank*, 10 Heisk. (Tenn.) 618; *Citizens' National Bank of Piqua v. Leming*, 8 Inter. Rev. Rec. 132; *Wiley v. Starbuck*, 44 Ind. 298; *Tomblin v. Higgins*, 53 Neb. 92, 73 N. W. 461; *Snyder v. Mt. Sterling National Bank*, 94 Ky. 233, 21 S. W. 1050; *National Bank v. Grimes*, 49 Kan. 219, 30 Pac. 474; *Smith v. First National Bank*, 70 App. Div. 376 (1902), 75 N. Y. S. 131.

And if the note is renewed from time to time, the transaction is not purged of the usury by such renewals.<sup>26a</sup>

Such renewal does not operate as a payment of the usurious interest.<sup>26b</sup>

In either case the result is the same. The bank loses all interest. If the renewals be made by adding the usurious interest to the principal, then the bank will recover the amount of the last of the renewal series less all interest included in it.<sup>26</sup>

Where the statute required a "memorandum in writing" if a greater rate of interest than six per cent was taken, and the bank discounted notes in which the interest was stated to be at ten per cent, it was *held*, that the transaction was not usurious.<sup>27</sup>

Usury paid to a bank must be alleged and proved in order to be recovered. Where illegal interest has been charged, *but not paid*, on a note given to a national bank, an action cannot be maintained to recover such interest.<sup>27a</sup>

So where the note is discounted, the interest deducted, and the proceeds credited, there is no *payment* of the usurious interest within the meaning of section 5198.<sup>27b</sup>

The only person in whom the right of action exists is the person who paid the money,<sup>28</sup> and the money paid must be interest on his own debt and not on the debt of another.<sup>28a</sup>

<sup>26a</sup> *National Bank v. Grimes*, 49 Kan. 219, 30 Pac. 474; *Brown v. Marion National Bank*, 169 U. S. 416, 42 L. ed. 801, 18 Sup. Ct. 390 (1897); *Citizens' National Bank v. Donnell*, *supra*; *First National Bank v. McCarthy*, 18 S. D. 218, 100 N. W. 14 (1904); *Charleston National Bank v. Bradford*, 51 W. Va. 255, 41 S. E. 153 (1902).

The payment contemplated by the statute is an actual payment and not a future promise to pay. *First National Bank v. Lasater*, 196 U. S. 115, 49 L. ed. 408, 25 Sup. Ct. 206 (1905).

<sup>26b</sup> *Savings and Loan Co. v. Multnomah Co.*, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. 392.

<sup>27</sup> *Newell v. National Bank of Somerset*, 12 Bush (Ky.) 57. In New York, prior to 1891, national banks might charge 6 per cent on oral contracts and 8 per cent on written contracts. *Union National Bank v. Railway*, 145 Ill. 208, 34 N. E. 135; *Citizens' National Bank v. Donnell*, 195 U. S. 369, 49 L. ed. 238, 25 Sup. Ct. 49 (1904), affirming 172 Mo. 384, 72 S. W. 925 (1903).

<sup>27a</sup> *Hall v. Bank*, 30 Neb. 99, 46 N. W. 150; *First National Bank v. Clark*, 161 Ala. 497, 49 So. 807 (1909).

<sup>27b</sup> *National Bank v. Carpenter*, 52 N. J. L. 165, 19 Atl. 181; *Smith v. First National Bank*, 70 App. Div. 376 (1902), 75 N. Y. S. 131.

The giving of a renewal note is not *payment* upon which to found a basis of recovery. *First National Bank v. Latham*, 37 Okla. 286, 132 Pac. 891 (1913).

<sup>28</sup> *Nash v. Manufacturers and Traders' Bank*, 5 Hun (N. Y.) 568;

In order to work a forfeiture under the National Currency Act, it should appear affirmatively that the bank knowingly received or reserved an amount in excess of the statutory rate of interest and the current exchange for sight drafts.<sup>29</sup>

In a suit brought against a State bank to enforce the penalty prescribed by section 5198 for taking a usurious rate of interest, it was *held*, that, although the act gave jurisdiction of such suits to the State courts, the act of taking such interest was penal, and the penalty was provided solely by the Federal statute, and therefore that part of the act which conferred jurisdiction on the State courts was unconstitutional.<sup>30</sup>

(e) A bill to recover usury cannot be maintained against a national bank. It is not subject to the laws of the State concerning usury, except so far as Congress may see fit to permit.<sup>31</sup>

*Smith v. Exchange Bank*, 26 Ohio St. 141; *National Bank v. Rowley*, 52 Kan. 394, 34 Pac. 1049; *Charleston National Bank v. Bradford*, 51 W. Va. 255, 41 S. E. 153 (1902).

A person may include a partnership. *Lasater v. First National Bank*, 96 Tex. 345, 72 S. W. 1057 (1903).

The legal representatives may recover. *Farmers' National Bank v. McCoy*, 42 Okla. 420, 141 Pac. 792 (1914); *Lake Benton First National Bank v. Watt*, 184 U. S. 151, 46 L. ed. 475, 22 Sup. Ct. 457 (1902); *Lasater v. First National Bank*, 96 Tex. 345, 72 S. W. 1057 (1903), trustee in Bankruptcy. The claims may also be assigned. *Lasater v. First National Bank*, *supra*.

See *First National Bank v. Lasater*, 196 U. S. 115, 49 L. ed. 408, 25 Sup. Ct. 206 (1905), where it is intimated that L. who gave a note to a bank with H. as surety could maintain the suit when by agreement between L. and H. H. paid the note by giving his own personal note which he subsequently paid. And two joint makers of a note to a national bank who have separately but from a joint fund paid usurious interest on a note may jointly maintain an action to recover the penalty. *Merchants' etc. National Bank v. Horton*, 27 Okla. 689, 117 Pac. 201 (1911). But see *Trabue v. Cook*, 124 S. W. 455, Tex. Civ. App. (1910), holding that if one joint maker pays the usurious interest the other joint maker cannot take advantage thereof.

<sup>28a</sup> *First National Bank v. Davis*, 135 Ga. 687, 70 S. E. 246, 36 L. R. A. (N. S.) 134, n. (1911).

<sup>29</sup> *Wheeler v. Union National Bank of Pittsburg*, 10 Chic. Leg. News, 281; s. c. 96 U. S. 268, 24 L. ed. 833.

When property is accepted in payment it must appear that its market value was in excess of the debt and legal interest and that it was intended by the debtor and accepted by the bank as payment not only of the lawful interest but also of the illegal interest. *First National Bank v. Davis*, 135 Ga. 687, 70 S. E. 246, 36 L. R. A. (N. S.) 134, n. (1911).

<sup>30</sup> *Ordway v. Central National Bank*, 8 Chic. Leg. News, 291; s. c. 47 Md. 217. See also *Miss. River Tel. Co. v. First National Bank*, 7 Chic. Leg. News, 158; s. c. 74 Ill. 217.

<sup>31</sup> *Hambright v. Cleveland National Bank*, 71 Tenn. 40.

A note actually made and signed in Washington, but dated at Leavenworth, Kansas, and sent to the Second National Bank of Leavenworth and by it discounted, is to be governed, as respects a question of usury, by the law of Kansas. To take out interest in advance on discounting a note by a bank is not usurious. A contract for the loan of money at a rate of interest which is legal in the place where the contract was made, though the money is to be repaid in a State where the rate of interest is lower, is not usurious, provided it be not a mere device to evade the laws of the State where the money is to be repaid.<sup>32</sup>

(f) When the maker and indorser of a note resides in New York, and the note is drawn, dated, and payable in that State, the laws of New York must govern as to the rate of interest. If drawn "with interest", the rate will be seven per cent; if drawn without specifying the rate of interest, the same rate of discount must be legal. And where such a note is discounted by a New Jersey bank, the statute of New Jersey limiting the rate of interest to six per cent does not render the note usurious and void when discounted at seven per cent.<sup>33</sup>

A surety cannot avail himself of usurious interest paid by his principal on a non-negotiable note, after execution of the note, in reduction thereof.<sup>34</sup>

A claim against a bank based in usury cannot be set off in an action brought by the bank upon a note other than that upon which the usurious interest was paid.<sup>35</sup>

(g) Where a national bank has received upon a promissory note a greater rate of interest than is lawful in the State where the note was made, in violation of Rev. Sts. § 5197, it has been held that the forfeiture provided in Rev. Sts. § 5198 may be availed of in an action brought by the bank on the note in the courts of a State other than that in which the note was discounted. Also that the limitation of two years after the unlawful receiving of the interest does not run against this defence.<sup>36</sup> (See above *b*, note 11.)

But against the right to sue to recover the interest, the statute

<sup>32</sup> *Second National Bank v. Smoot*, 2 McArthur (D. C.), 371.

<sup>33</sup> *Hackettstown National Bank v. Rea*, 64 Barb. (N. Y.) 175.

<sup>34</sup> *Lamoille County National Bank v. Bingham*, 50 Vt. 105.

<sup>35</sup> *Fraker v. Cullum*, 24 Kan. 679.

<sup>36</sup> *First National Bank of Peterborough v. Childs*, 130 Mass. 519; *McCarthy v. First National Bank*, 223 U. S. 493, 56 L. ed. 523, 32 Sup. Ct. 240 (1911).

runs from the date when the usurious interest was paid,<sup>37</sup> or, if the note is discounted, from the time the usurious interest is retained by the bank, not from the time when the discounted note falls due, or from the time judgment is rendered thereon.<sup>37a</sup>

The National Banking Act does not authorize the courts to declare a contract of indorsement void for usury.<sup>38</sup>

*The two years' limitation*, Rev. Sts. §§ 5197, 5198, is two years from the time the interest was paid, without regard to the principal.<sup>39</sup>

(h) *A State court has jurisdiction of an action by a borrower against a national bank to recover the penalty prescribed by the Rev. Sts. §§ 5197, 5198, for receiving usurious interest.*<sup>40</sup>

The courts cannot, by allowing a *set-off* or otherwise, apply

<sup>37</sup> *Stephens v. Monogahela National Bank*, 88 Pa. St. 157; *First National Bank v. Smith*, 36 Neb. 199, 54 N. W. 254.

<sup>37a</sup> *Bobo v. People's National Bank*, 92 Tenn. 449, 21 S. W. 888; *First National Bank v. Hunter*, 109 Tenn. 91, 70 S. W. 371 (1902).

<sup>38</sup> *Oates v. First National Bank of Montgomery*, 100 U. S. 239, 25 L. ed. 580.

<sup>39</sup> *Lynch v. Merchants' National Bank of West Virginia at Clarksburg*, 22 W. Va. 554; *First National Bank v. Smith*, 36 Neb. 199, 54 N. W. 254; *Carpenter v. National Bank*, 50 N. J. L. 6, 11 Atl. 478; *Norfolk National Bank v. Schwenk*, 46 Neb. 381, 64 N. W. 1073; *First National Bank v. Denson*, 115 Ala. 650, 22 So. 518; *Smith v. First National Bank*, 70 App. Div. 376 (1902); 75 N. Y. S. 131. See *McCarthy v. First National Bank*, 23 S. D. 269, 121 N. W. 853, 23 L. R. A. (N. S.) 335 (1909); *Lasater v. First National Bank*, 96 Tex. 345, 72 S. W. 1057 (1903); *McCarthy v. First National Bank*, 223 U. S. 493, 56 L. ed. 523, 32 Sup. Ct. 240 (1911).

The statute does not begin to run from the date of the loan or from the date of the satisfaction of the debt, but from the date interest is paid. *McCarthy v. First National Bank*, 223 U. S. 493, 56 L. ed. 523, 32 Sup. Ct. 240 (1911).

See *Chipman v. Farmers' etc. National Bank*, 121 Md. 343, 88 Atl. 151 (1913), holding that a borrower is not entitled to have usurious interest which has been paid applied on the principal, after the expiration of two years.

<sup>40</sup> *Lynch v. Merchants' National Bank of West Virginia at Clarksburg*, 22 W. Va. 554. *Schuyler National Bank v. Bollong*, 32 Neb. 70, 48 N. W. 826; *First National Bank v. Overman*, 22 Neb. 116, 34 N. W. 107; *National Bank v. Johnson*, 91 Ky. 181, 15 S. W. 134; *Henderson National Bank v. Alves, Assignee*, 91 Ky. 149, 15 S. W. 132; *Morgan v. First National Bank*, 93 N. C. 352; *Ingraham v. Merchants' National Bank*, 153 Iowa 408, 132 N. W. 869 (1911); *McCreary v. First National Bank*, 109 Tenn. 128, 70 S. W. 821 (1902); *Charleston National Bank v. Bradford*, 51 W. Va. 255, 41 S. E. 153 (1902).

Proceedings may be had in any State, county or municipal court in the county or city in which the bank is located. *Farmers' National Bank v. McCoy*, 42 Okla. 420, 141 Pac. 792 (1914).



any remedy other than that prescribed by the Rev. Sts. §§ 5197, 5198, for the taking by a national bank of usurious interest.<sup>41</sup>

National banks are subject only to the penalties prescribed by the United States Banking Act, for taking usury.<sup>42</sup>

(i) The right of action under the U. S. Rev. Sts. § 5197, to recover double, etc., accrues upon the borrower's actual payment of the illegal interest; the debt need not have been paid.<sup>43</sup>

Illegal interest received by a national bank on a series of renewal notes cannot, in its suit on the last note of the series, be set off by the defendant. His only remedy is by a suit under the National Banking Act to recover the penalty.<sup>44</sup>

The National Banking Act of 1864, § 30, does not make the *principal debt forfeitable for usury*;<sup>44a</sup> and the prohibition does not render the contract void,<sup>45</sup> nor can the bank defeat an accounting between itself as loaning agent, and its principal, on the ground that the loan was at usurious interest.<sup>45a</sup>

(j) One who in the United States court has recovered the penalty prescribed by the Rev. Sts. §§ 5187, 5188, for usury, cannot maintain assumpsit in a State court to recover the excess above the legal interest paid to the bank.<sup>46</sup>

The only remedy for a party paying interest to a national bank is that prescribed by the National Banking Act, not by set-off.<sup>47</sup>

<sup>41</sup> *National Exchange Bank v. Boylen*, 26 W. Va. 554; *National Bank v. Lynch*, 69 W. Va. 333, 71 S. E. 389 (1911); *First National Bank v. Hunter*, 109 Tenn. 91, 70 S. W. 371 (1902); *Haseltine v. Central National Bank*, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. 49 (1901); *Schuyler National Bank v. Gadsden*, 191 U. S. 451, 48 L. ed. 258, 24 Sup. Ct. 129 (1903); *Merchants' National Bank v. Sharkey*, 64 Or. 32, 128 Pac. 1005 (1913); *Rushing v. Citizens' National Bank*, 162 S. W. 460 (Tex. Civ. App.) (1914).

<sup>42</sup> *Merchants & Farmers' National Bank of Charlotte v. Myers*, 74 N. C. 514; *First National Bank v. Barnett*, 51 Neb. 397, 70 N. W. 937; *Slade v. Squier*, 133 App. Div. 666 (1909), 118 N. Y. S. 278.

<sup>43</sup> *Monongahela National Bank v. Overholt*, 96 Pa. St. 327.

<sup>44</sup> *National Bank of Fayette County v. Dushane*, 96 Pa. St. 340.

<sup>44a</sup> *In re Samuel Wilde's Sons*, 133 Fed. 562 (1904); *Slade v. Squier*, 133 App. Div. 666 (1909), 118 N. Y. S. 278; *Meadors v. Johnson*, 27 Okla. 544, 112 Pac. 1121 (1910).

<sup>45</sup> *National Exchange Bank of Columbus v. Moore*, 2 Bond 170.

A charge of usury by a bank will not defeat the foreclosure of a mortgage to enforce the principal debt. *Meadors v. Johnson*, 27 Okla. 544, 112 Pac. 1121 (1910). See *First National Bank v. McCarthy*, 18 S. D. 218, 100 N. W. 14 (1904).

<sup>45a</sup> *Porter v. Sherman County Banking Co.*, 40 Neb. 274, 58 N. W. 721; *Barbour v. Bank*, 50 Ohio St. 90, 33 N. E. 542.

<sup>46</sup> *Hill v. National Bank of Barre*, 56 Vt. 582.

<sup>47</sup> *Oldham v. First National Bank of Wilmington*, 85 N. C. 240.

(k) In a suit by a national bank against all the parties to a bill of exchange discounted by it, the acceptor's assignees, intervening as parties, cannot set up in counter claim that the bank, in discounting a series of bills [or notes] of their assignor, the proceeds of which it used to pay other bills, knowingly took an illegal rate of interest.<sup>48</sup>

The representative of the person paying the unlawful interest can resort to no other procedure than that prescribed by act of 1864 (13 U. S. Stat. at Large, 99, § 30).

Reaffirmed in *Driesbach v. Second National Bank of Wilkesbarre*, 104 U. S. 52, 26 L. ed. 658. "Usurious interest *paid* a national bank on renewing a series of notes cannot, in an action by the bank on the last of them, be applied in satisfaction of the principal of the debt."<sup>49</sup>

A guaranty of negotiable paper discounted by a national bank is not rendered void by the fact that the bank received usurious interest thereon.<sup>50</sup>

Where a note discounted by a national bank at a usurious rate was several times renewed, and partial payments made, *held*, that, the interest being forfeited, these should be applied to reduce the principal.<sup>51</sup>

(l) The rule that the taint in a usurious contract survives in all its transmutations, applies only to cases in which the obligor or promisor remains the same.<sup>52</sup>

The penalty for usury (U. S. Rev. Sts. § 5198) cannot be set off in an action to recover the principal.<sup>52a</sup> The limitation to two

<sup>48</sup> *Barnet v. Second National Bank of Cincinnati*, 98 U. S. 555, 25 L. ed. 212; *First National Bank v. Hunter*, 109 Tenn. 91, 70 S. W. 371 (1902).

When suit is brought by the bank the interest paid cannot be allowed by set-off or counter claim even though the State statute provides that it may. *Merchants' National Bank v. Sharkey*, 64 Or. 32, 128 Pac. 1005 (1913).

<sup>49</sup> *Driesbach v. Second National Bank of Wilkesbarre*, 104 U. S. 52, 26 L. ed. 658; *First National Bank v. Barnett*, 51 Neb. 397, 70 N. W. 937.

<sup>50</sup> *Lazear v. National Union Bank of Maryland*, 52 Md. 78.

<sup>51</sup> *Moniteau National Bank v. Miller*, 73 Mo. 187; *Exeter National Bank v. Orchard*, 39 Neb. 485, 58 N. W. 144; *Danforth's Executors v. National State Bank*, 1 Dist. R. (Pa.) 102; *Hall v. Bank*, 30 Neb. 99, 46 N. W. 150; *First National Bank v. Miltonberger*, 33 Neb. 847, 51 N. W. 232; *Citizens' National Bank v. Donnell*, 195 U. S. 369, 49 L. ed. 238, 25 Sup. Ct. 49 (1904), affirming 172 Mo. 384, 72 S. W. 925 (1903).

<sup>52</sup> *Macungie Savings Bank v. Hottenstein*, 89 Pa. St. 328 (1879).

<sup>52a</sup> The New York Banking Law is similar in its provisions. *Caponigri v. Altieri*, 29 App. Div. (Hun. N. Y.) 304; *Schlesinger v. Lehmaier*, 117 App. Div. 428 (1907), 102 N. Y. S. 630.

years of the right of action to recover it is not available as a defence in an action by the bank.<sup>53</sup>

(m) The State courts have jurisdiction of suits to recover the penalty for taking usurious interest under the National Banking Law.<sup>54</sup> In *Bletz v. Columbia National Bank*, the defendant urged that it was a settled principle of law that one sovereignty would not enforce a penalty imposed by another.

The court said that this was not a penalty to be adjudged to the United States or vested in the public, but is a private right belonging to the borrower alone. Justice Bradley, quoting Alexander Hamilton, said, "When we consider the State governments and the national government in the light of kindred systems, as they truly are, and parts of one whole, the inference seems conclusive that the State courts would have concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly denied."

The Judiciary Act was framed with this view, giving exclusive jurisdiction to the Federal courts in cases of national import, and concurrent in other cases, as those of civil remedies for the wrongs of individuals. In *Buckwalter v. United States*, a suit in the name of the United States was sustained in a State court for a penalty under United States law, on the ground of the intolerable inconvenience of dragging a man from the remotest corner of a State to the seat of the Federal judiciary, and that such jurisdiction was not in conflict with the United States Constitution.

As a general proposition, legal or equitable rights acquired under either the State or Federal system may be enforced by the courts of the other, if its jurisdiction is competent for that kind of subject matter, and such jurisdiction is not specially denied.

(n) A national bank charging usurious interest on overdraft loses the right to recover any interest at all.<sup>55</sup>

An agreement between a national bank and M., from whom it had taken usurious interest, that the amount recoverable therefor, under U. S. Rev. Sts. § 5198, should be applied to reduce M.'s

<sup>53</sup> *Ellis v. First National Bank of Olney*, 11 Ill. App. 275; *McCarthy v. First National Bank*, 223 U. S. 493, 56 L. ed. 523, 32 Sup. Ct. 240 (1911).

<sup>54</sup> *Bletz v. Columbia National Bank*, 87 Pa. St. 87; *Gruber v. First National Bank of Clarion*, 8 Wk. Notes, 113 (Pa.); *Hade, Receiver, v. McVay*, 31 Ohio St. 231; *National Bank of Winterset v. Eyre*, 52 Iowa 114, 2 N. W. 995. See *Buckwalter v. United States*, 11 Serg. & R. (Pa.) 193.

<sup>55</sup> *Third National Bank of Philadelphia v. Miller*, 90 Pa. St. 241; *Citizens' National Bank v. Donnell*, 172 Mo. 384, 72 S. W. 925 (1903), affirmed in 195 U. S. 369, 49 L. ed. 238, 25 Sup. Ct. 49 (1904).

indebtedness to the bank, and that the bank, in consideration thereof, should satisfy such balance as should remain due to it after application of certain collections, was held to preclude maintenance of an action against the bank by the receiver of M.'s estate, in proceedings supplementary to execution.<sup>56</sup>

Usurious discount by a national bank destroys the interest-bearing power of the note<sup>57</sup> until judgment, from which time it bears the regular legal rate just as if no other rate had been agreed upon.<sup>57a</sup>

In a suit to recover the penalty under § 5198, the bank cannot set off a judgment or other claim held by it against the plaintiff.<sup>58</sup> But after a judgment is obtained on such penalty the bank may set off any judgment it may hold against the plaintiff.<sup>58a</sup>

A receiver of an insolvent corporation is a legal representative within Rev. Sts. § 5198.<sup>59</sup>

Rev. Sts. § 5197 applies to taking usurious interest from artificial as well as natural persons.<sup>59a</sup>

If by *mistake* a sum, in excess of the legal rate of interest, is collected by a national bank the transaction is not tainted with usury.<sup>59b</sup>

The plaintiff in an action against the bank under Rev. Sts. § 5198, must allege that the usurious interest was "knowingly" taken or charged by said bank.<sup>59c</sup>

But it is not necessary for the plaintiff to state under what statute the penalty has been incurred,<sup>59d</sup> or to state the particular notes or transactions in which the payments were made.<sup>59d'</sup>

<sup>56</sup> *Morehouse v. Second National Bank of Oswego*, 98 N. Y. 503.

<sup>57</sup> *Guthrie v. Reid*, 107 Pa. St. 251; *Alves, Trustee, v. Henderson National Bank*, 89 Ky. 130, 9 S. W. 504; *Shafer v. National Bank*, 53 Kan. 614, 36 Pac. 998.

<sup>57a</sup> *Brown, Assignee, v. Marion National Bank*, 92 Ky. 612, 18 S. W. 635; *Schafer v. National Bank*, 53 Kan. 614, 36 Pac. 998.

<sup>58</sup> *Lebanon National Bank v. Karmany* 98 Pa. St. 65.

<sup>58a</sup> *Barbour v. Bank*, 50 Ohio St. 90, 33 N. E. 542.

<sup>59</sup> *Barbour v. National Exchange Bank*, 45 Ohio St. 133, 12 N. E. 5.

<sup>59a</sup> *Albion National Bank v. Montgomery*, 54 Neb. 681, 74 N. W. 1102.

<sup>59b</sup> *Hall v. Bank*, 30 Neb. 99, 46 N. W. 150.

<sup>59c</sup> *Henderson National Bank v. Alves, Assignee*, 91 Ky. 150, 15 S. W. 132; *First National Bank v. Davis*, 135 Ga. 687, 70 S. E. 246, 36 L. R. A. (N. S.) 134 (1911); *Meredith v. First National Bank*, 127 Tenn. 68, 152 S. W. 1038 (1913). See *Farmers' National Bank v. McCoy*, 42 Okla. 420, 141 Pac. 791 (1914).

<sup>59d</sup> *Henderson National Bank v. Alves, assignee, supra*.

<sup>59d'</sup> *Meredith v. First National Bank*, 127 Tenn. 68, 152 S. W. 1038 (1913).

The court takes judicial notice of the legal rate that may be charged by a bank, and the right of a bank to charge more need not be negatived in the complaint.<sup>59e</sup>

The burden of proof is on the party claiming the contract to be usurious,<sup>59f</sup> and it should be alleged in the petition that usurious interest has been paid and that the bank took it knowingly.<sup>59f</sup>

The only remedy, given by the statute, to recover usurious interest is a penal suit.<sup>59g</sup>

(2) **Banks of Issue.** Under U. S. Rev. Sts. § 5197, "banks of issue" do not include savings banks nor banks of deposit.<sup>60</sup>

§ 231. The fact that the reserve falls below the legal limit does not as a matter of law affect with a legal presumption of bad faith all transactions made with or concerning the bank while the reserve is thus impaired.<sup>1</sup>

§ 233. The directors of national banks can declare dividends only out of net profits. But if upon a proper reduction of the capital stock, bad and doubtful assets are charged off and set aside by the directors for the benefit of the stockholders of record, the fund set aside is equivalent to net profits.<sup>1</sup>

The intention of the statute is simply to preserve intact the capital stock and to provide for turning a part of the net profits into a surplus fund until the accumulation equals twenty per cent of the capital stock.<sup>1</sup>

§ 234.<sup>1</sup> A note whose payment is guaranteed by a national bank is a liability of the bank which is required by U. S. Rev. Sts. § 5211 to be shown in the report of the Comptroller of the Currency.<sup>2</sup>

The report of the association to the Comptroller of the Currency is to apprise him of the currency, *and the public* of the condition of the bank, and one contemplating a purchase of the stock has

<sup>59e</sup> *Morgan v. First National Bank*, 93 N. C. 357.

<sup>59f</sup> *Carley v. Tod*, 83 Hun (N. Y.) 53; *Merchants' etc. National Bank v. Horton*, 27 Okla. 689, 117 Pac. 201 (1911).

<sup>59g</sup> *First National Bank v. Langston*, 32 Okla. 795, 124 Pac. 308 (1912); *First National Bank v. Ellis*, 27 Okla. 699, 114 Pac. 620, 1912C Ann. Cas. 687, n.

<sup>59g</sup> *Cox v. Buck*, 83 Fed. 269 (1897).

<sup>60</sup> *First National Bank of Clarion v. Gurber*, 87 Pa. St. 468.

<sup>1</sup> § 231. *Earle v. Carson*, 188 U. S. 42, 47 L. ed. 373, 23 Sup. Ct. 254 (1902).

<sup>1</sup> § 233. *Cogswell v. Second National Bank*, 78 Conn. 75, 60 Atl. 1059 (1905).

<sup>1</sup> § 234. R. S. 5211. § 34.

<sup>2</sup> *Cochran v. United States*, 157 U. S. 286, 39 L. ed. 704, 15 Sup. Ct. 628 (1895).

a legal right to rely on the report as a true condition of the bank's financial condition.<sup>3</sup>

§ 235. A national bank organized under the law of 1864 cannot, even by specific provisions for the purpose in its articles of association and in its by-laws, acquire a lien on its own stock held by its debtor.<sup>1</sup>

When a national bank loans money on its own stock in violation of U. S. Rev. Sts. § 5201, the loan is voidable only and the bank may convey a good title to its stock held as collateral.<sup>2</sup>

The United States alone can complain of a violation of U. S. Rev. Sts. § 5201 by a national bank, at least after the contract of pledge has been executed by foreclosure.<sup>3</sup>

§ 236.<sup>1</sup> A bank may defend against a note on the ground that it was given in violation of U. S. Rev. Sts. § 5202, which provides that national banks shall not contract liabilities in excess of their paid-up capital.<sup>2</sup>

The gross rents to be paid for property leased for 99 years is not an indebtedness within the meaning of U. S. Rev. Sts. 5202, and the lease is not invalid because the gross rents are larger than the authorized indebtedness of the bank.<sup>3</sup>

The liability of a bank is not increased by the fact that it enters into a written agreement to pay money deposited, and a bond given to secure depositors is not *ultra vires*.<sup>4</sup>

§ 238.<sup>1</sup> A stockholder is not liable as having withdrawn or permitted to be withdrawn, in the form of a dividend, any portion of the capital of a bank, when he has simply, and in good faith, received a dividend he honestly supposed to be declared out of the profits.<sup>2</sup>

<sup>3</sup> *Smalley v. McGraw*, 148 Mich. 384, 111 N. W. 1093 (1907). See *Gerner v. Yates*, 61 Neb. 100, 84 N. W. 596 (1902); *Macdonald v. De Fremery*, 168 Cal. 189, 142 Pac. 73 (1914).

<sup>1</sup> § 235. *Delaware, L., & W. Railroad Co. v. Oxford Iron Co.*, 38 N. J. Eq. 340. See I. § 698 A. See *Bridges v. Troy National Bank*, 185 N. Y. 146, 77 N. E. 1005 (1906).

<sup>2</sup> *Barron v. McKinnon*, 196 Fed. 933 (1912).

<sup>3</sup> *First National Bank v. Lantz*, 202 Fed. 117 (1913).

<sup>1</sup> § 236. R. S. 5202. § 36.

<sup>2</sup> *Weber v. Spokane National Bank*, 50 Fed. 735.

<sup>3</sup> *Brown v. Schleier*, 118 Fed. 981 (1902).

<sup>4</sup> *Gratiot County Supervisors v. Munson*, 157 Mich. 505, 122 N. W. 117 (1909).

<sup>1</sup> § 238. R. S. 5204. § 36.

<sup>2</sup> *McDonald v. Williams*, 174 U. S. 397, 43 L. ed. 1022, 19 Sup. Ct. 743 (1899).

The decision of the Comptroller of the Currency as to the impairment of the capital stock in a national bank is conclusive and final on the stockholders and courts and leaves no alternative to the bank but to make up the deficiency or to go into liquidation.<sup>3</sup>

If the assessment is not paid the stockholders' stock may be sold to pay the assessment.<sup>4</sup>

United States Revised Statutes § 5205 is intended to and does confer upon a national banking association the privilege of declining to make the assessment to make good the deficiency in the capital after notice by the Comptroller of the Currency to do so, and to elect instead to wind up the bank under United States Revised Statutes § 5220. The stockholders and not the directors have the right to decide upon which course shall be pursued, and an assessment made upon the shares by the directors without action by the stockholders is void.<sup>4</sup>

### § 241. Taxation of National Banks.<sup>0</sup>

By the United States. § 41.

Tax return to be made. § 41.

Penalty for failure. § 41.

Tax on dividends. § 411 *w*.

By the State.

#### I. Power of State.

Congress may protect national institutions from death by State taxation (§ 241); but so far as not prohibited, the States and territories may tax national banks. (*p*) Congress having exercised its power and prescribed the conditions of State taxation, all taxation, except as expressly permitted, is prohibited. (*l, o*)

#### II. Conditions and limitations of State power.

The object of the law is to prevent unfair discrimination against national banks, which would interfere with their success, and the spirit not the letter of the law controls. (*b, y*)

- (1) Wherefore, "*other moneyed capital*" in this statute is to be interpreted to mean money employed to make a profit by using it as money; such capital as is employed in banking business (loaning, discounting, investing in government securities, etc.), and all capital in the hands of individuals employed in a similar way, invested in loans or securities for the payment of money, either as a permanent investment, or temporarily, with a view to sale or repayment, and reinvestment. (*y*)

On *such* moneyed capital, *in general* (*w, c, y*), the tax levied by the State must not be less than that upon national banks. Even

<sup>3</sup> Thomas *v.* Gilbert, 55 Or. 14, 101 Pac. 393, 1912A Ann. Cas. 516, n.

<sup>4</sup> Commercial National Bank *v.* Weinhard, 192 U. S. 243, 48 L. ed. 425, 24 Sup. Ct. 253 (1904), affirming 41 Or. 359, 68 Pac. 806 (1902).

<sup>0</sup> § 241. R. S. 5215, 5219. §§ 41, 77, 80.

particular portions of such capital may be exempted by the State without affecting its right to tax national banks, so long as the amount exempted is not sufficient to affect substantially the general rate of taxing such capital (*c, c<sup>2</sup>, v*); otherwise, if the amount is considerable. (*w*)

- (2) But money in the hands of a corporation not used as above, and therefore not liable to come in conflict with national banks, is not within the view of this law, though its shares are moneyed capital in the hands of individual holders. (*y, w*)

Exemptions not affecting the State's right to tax national banks.

*Trust Companies* under the New York laws are not within the reason of the provision, and their exemption would not affect national taxation. (*y*)

*Savings bank deposits* are exempted for a good reason, — to encourage accumulation by the poorer classes. They are moneyed capital in the hands of individuals. But it is equally clear that they are not within the reason of the law. Savings banks cannot come in serious conflict with national banks. Only banks of issue could work a displacement of them; and an exemption of some particular moneyed capital, if not amounting to an unfriendly discrimination against national banks, will not operate to exempt national banks from the State tax. (*y*)

Assessing the paid-up capital of savings banks not an unlawful discrimination. (*z*)

When a State has done all in its power to conform to the United States law, and tax State banks equally with national, but is prevented by old charters which a few of the banks refuse to give up, such substantial compliance by the State is sufficient. (*d*)

*Municipal bonds* are moneyed capital, but not being ordinarily subject to taxation, they are not within the reason of the law. (*y*)

Exemption of mortgages, judgments, recognizances, and moneys owing on agreements for the sale of lands, does not affect the right to tax national banks; 1st, it is a just exemption to prevent double taxation; 2d, it is only a partial exemption. (*y*)

Exemption of shares of manufacturing, mining, and insurance companies cannot affect the competition against or success of national banks, and there is therefore no reason to suppose that Congress intended to interfere with the right of the States in respect to such companies. (*y*)

What does affect the State's right?

Any considerable exemption of moneyed capital as above expounded. (*v*)

A tax on "capital" is not equivalent to a tax on "shares", for a part of the capital may be so invested as to escape from the former. If, therefore, State banks are taxed on their capital instead of their shares, the State cannot tax national bank shares. (*d, e, m, t*)

If the owner of other moneyed capital may deduct his debts, and a national bank shareholder cannot, it is an unlawful discrimination. (*w*. See *r*)



Assessing national bank shares at full value, and other property at four per cent of its value, is illegal. (b)

### III. What may be taxed.

- (1) The *shares, real estate, and surplus* capital of national banks may be taxed by the State, double taxation being avoided. (a, t, w)  
That is, if the real estate is taxed as such, its amount must be deducted from the assessment of the shares in taxing the latter. (b, l)

Dividends may be taxed. (t, v, w)

- (2) The *capital* in mass, as distinguished from the shares, cannot be taxed. (b)

The personal property of the bank is not taxable. (w, v)

*New shares* cannot be taxed until the Comptroller issues his certificate of approval. (s)

Circulating notes of a national bank are not taxable. § 241.

United States legal tender notes cannot be taxed in the hands of a bank; but it does not follow from such possession that the notes represent any part of the capital shares on which a tax is laid.

The notes may represent deposits, etc. (u)

The franchise or intangible property cannot be taxed. (u)

- (3) The fact that the bank's capital is invested in United States bonds does not prevent taxation upon the shares. (c, d, r)

### IV. "Other moneyed capital." See above, II.

The provision does not refer to over-valuation, but the rate per cent established for taxation. (r)

Refers to other *taxable* capital. (x)

Means not only capital invested in State banks, but extends to all capital in the hands of citizens generally. (v)

### V. Manner of taxing, etc.

Shares are to be assessed in some jurisdictions at their actual market value, in others they may be assessed at their par value. (b, c, r)

Is free to the choice of the State, but the valuation of shares must not be excessive. (c, j)

The tax may be made a lien on the shares. (i, j)

And it may be made payable by the bank instead of by the individual shareholders. (a, g)

The State may require national banks to send the town clerk lists of their shareholders. (h)

In Massachusetts, the shareholder must give yearly notice to the bank of his residence. (i)

### VI. Place.

National bank shares are to be taxed in no other *State* than the one in which the bank is located. §§ 41, 241, e, g, i, l.

But the State may use its discretion about taxing the shares in the township of the bank or of the owner's residence. (f, p, s)

Shares of a deceased person are to be assessed at his domicile. (n)

Deposits received at the Philadelphia office of a New Jersey bank are not taxable in Philadelphia. (r)

### VII. Change of State to national bank.

Questions of taxation. (n, s)

### VIII. Construction of "municipal purposes." (a)

- IX. Repeal of a tax law does not affect taxes already assessed. (a)

- X. Injunction, etc.

A court will not relieve from inequality of valuation resulting from mere error of judgment, but only when it was intentional. (x)  
 Will be granted in case of assessing national shares at a greater per cent than other property. (u)  
 Will be granted where the law gives no remedy for recovery of tax, if paid. (b)  
 No injunction if the assessment, though wrong, does not do substantial injustice: (e)  
 The bank, as a corporation, may complain of an illegal assessment. (b)  
 As trustee for the stockholders, it may enjoin collection, thus avoiding multiplicity of suits. (a, v, x)

§ 241. **Taxation.** — Congress has power to protect the national banks, by forbidding the States to tax them. But they are not exempt from State taxation, unless Congress has actually exercised this power.<sup>1</sup>

It is only when a State law incapacitates a national bank from discharging its duties to the government that it becomes unconstitutional.<sup>1a</sup>

The Act of Congress enacting "that every national banking association, State bank," etc., "shall pay a tax of ten per centum on the amount of notes of any person, State bank", etc., "used for circulation and paid out by them", is not in violation of the Constitution, as being a direct, and not an apportioned tax, nor because the act imposing the tax impairs a franchise granted by the State.<sup>2</sup>

Reade, J.: "The power of Congress to tax the circulation of State banks depends upon whether they are for the use of the State government or for private profit; so the power of the State to tax the circulation of national banks depends upon whether they are for the use of the United States government or for private profit."<sup>3</sup>

Where by a State statute the owners of shares in national banks located within the State are subject to taxation on the *par value* of the shares owned by them, a statute authorizing the taxation of the surplus capital of banking institutions is valid.<sup>4</sup>

<sup>1</sup> *State v. Tuller*, 34 Conn. 280.

<sup>1a</sup> *McClellan v. Chipman*, 164 U. S. 347, 41 L. ed. 461, 17 Sup. Ct. 85 (1896).

<sup>2</sup> *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. ed. 482; *Twin City Bank v. Nebeker*, 167 U. S. 196, 42 L. ed. 134, 17 Sup. Ct. 766 (1897).

<sup>3</sup> *Ruffin v. Board of Commissioners*, 69 N. C. 498.

<sup>4</sup> *First National Bank v. Peterborough*, 56 N. H. 38. See also *State, North Ward National Bank of Newark v. City of Newark*, 10 Vroom (N. J.) 380.

Personal property, or, in other words, safes, office furniture, cash on hand and due from other banks, bills discounted, etc., that is, the so-called assets of a national bank, are not subject to taxation.<sup>5</sup>

A State law enacting that the stock of a national bank shall be assessed for taxes, as so much capital in the aggregate, intending that the tax should be levied on the sum total of the capital stock of the bank, is illegal. "The only way that such stock can be reached is to assess the shares of the different stockholders, in the same manner that assessments are made in other cases against property owned by the citizens and inhabitants of the State."<sup>6</sup>

The notes of a national bank, issued under authority of Congress for the purpose of circulation, are obligations of the national government; and are not taxable.<sup>7</sup>

The contrary has also been held.<sup>8</sup>

(a) A State statute requiring all the shares of a national bank to be assessed and taxed at their actual tax value, without any deduction on account of the real property held by the bank, and in which a portion of its capital is invested, does not authorize the taxation of real property, *eo nomine*, lawfully owned and used as a place for the transaction of its business by a national bank; for tax acts are presumed not to impose a double burden.<sup>9</sup>

Where by city charter an authority is given to collect a privilege tax, and by further legislative enactment "banks and banking" are specially deemed as privileges, the intention of the legislature is not to be so interpreted as to subject national banks to taxation.<sup>10</sup>

License fees imposed on banks by cities are legal.<sup>10a</sup>

By a statute of Indiana it was provided that a national bank should not be assessed for municipal purposes. A demurrer was sustained to a bill brought to restrain the collection of taxes assessed against a national bank for school purposes, or to aid

<sup>5</sup> National State Bank of Oskaloosa v. Young, 25 Iowa 311.

<sup>6</sup> Collins v. Chicago, 4 Biss. 472; St. Louis National Bank v. Papin, 3 Cent. Law Jour. 669; Thompson's National Bank Cas. 326; State v. Butler, 86 Tenn. 631, 8 S. W. 586.

<sup>7</sup> Horne v. Green, 52 Miss. 452.

<sup>8</sup> Board of Commissioners of Montgomery County v. Elston, 32 Ind. 27; Bank v. Nebeker, 3 App. Cas. (D. C.) 190.

<sup>9</sup> Board of County Commissioners of Rice County v. Citizens' National Bank of Faribault, 23 Minn. 280.

<sup>10</sup> National Bank of Chattanooga v. Mayor, 8 Heisk. (Tenn.) 814.

<sup>10a</sup> Oil City v. Oil City Trust Co., 1 Dist. R. (Pa.) 661.

in the construction of a railroad, these not being "municipal purposes" within the purview of the statute.<sup>11</sup>

The warrant in the hands of a collector of taxes assessed on national bank shares ordered him "to levy the same of the goods and chattels" of the shareholders. It was held, that under this authority he was not authorized to enforce collection by a seizure and sale of the property of the bank.<sup>12</sup>

An act of the State providing for the taxation of shares of a national bank is valid when applied to taxes for subsequent years and a bank is not exempted from its operation because of its acceptance of the provisions of the Hewett Act.<sup>12a</sup> The assessment of such shares by a State is valid even though they include value due to non-taxable United States bonds owned by the bank, which is not excluded.<sup>12b</sup>

But if the State statute enacts that the taxes on the shares shall be paid by the bank, then the property of the bank may be distrained in case of non-payment of such taxes.<sup>13</sup>

When city assessors assessed a tax upon a national bank, which tax was expressly prohibited by State law, and then, in order to enforce the assessment, sold the property of the bank, it was held that an action would lie by the bank against the city.<sup>14</sup>

An act in relation to the assessment of taxes which reads, "All acts and parts of acts inconsistent with this act are hereby repealed", relates only to the *future* assessment of taxes. It does not relate to the collection of taxes which have been duly assessed under previously existing laws.<sup>15</sup>

A national bank, as trustee for the entire body of stockholders, may maintain a bill of equity to restrain the collection of a tax upon its shares, when a multiplicity of suits is thereby avoided. And where a multiplicity of suits would ensue upon the enforcement of the tax, or where the law which authorizes the tax is itself valid, an injunction is the proper remedy. The better rule is, that the taxation of national banks should conform to that of

<sup>11</sup> *Root v. Erdelmeyer*, 37 Ind. 225.

<sup>12</sup> *First National Bank of Sandy Hill v. Fancher*, 48 N. Y. 524.

<sup>12a</sup> *First National Bank v. Covington*, 129 Fed. 792 (1902); *Covington v. First National Bank*, 198 U. S. 100, 49 L. ed. 963, 25 Sup. Ct. 562 (1905).

<sup>12b</sup> *Hager v. American National Bank*, 159 Fed. 396 (1908); *Charlestown National Bank v. Melton*, 171 Fed. 743 (1909).

<sup>13</sup> *First National Bank v. Douglas County*, 3 Dillon 330.

<sup>14</sup> *National Bank of Chemung v. Elmira*, 53 N. Y. 49.

<sup>15</sup> *Weld v. City of Bangor*, 59 Me. 416.

State banks, and that neither the highest nor the lowest rate of taxation should be imposed upon a national bank, where, by the law of the State wherein such bank is situated, different classes of moneyed capital are to be taxed at different rates.<sup>16</sup>

(b) A court of equity will not restrain the collection of a tax upon the shares of a national bank because a State statute does not set forth in express terms that there shall be no greater assessment upon national banks located within the State than upon the State banks.<sup>17</sup>

The statute of Kentucky which imposes upon a national bank a liability for past years for taxes and penalty, upon stock held without the State, and which, before the statute, it was not required to return, imposes a burden not borne by other moneyed capital, and the collection of such will be restrained.<sup>17a</sup> But the statute is not illegal as to resident stockholders, as there were provisions by statute for assessing them for stock in other moneyed corporations of the State before the passage of the statute.<sup>17b</sup> And it is immaterial that some of the shares have been transferred in the meantime or that the par value of the shares has been reduced.<sup>17b</sup>

National bank shares having been assessed at their full value, while all other property in the State was only assessed at from thirty to forty per cent of its real value, the court held that the assessment was illegal, and that the bank in its corporate capacity was a proper party complainant.<sup>18</sup>

Where the auditor of the county fixes the taxable value of shares in a national bank at 60 per cent of their true value, and submits the report to the State Board of Equalization, when the valuation is increased to 65 per cent, a corresponding change must be made in the valuation of other money capital of individuals to prevent such a discrimination as is forbidden by Rev. Sts. § 5219.<sup>18a</sup>

<sup>16</sup> *City National Bank v. Paducah*, 5 Cent. Law Jour. 347; *Thompson's National Bank Cas.* 300; *Knopf v. First National Bank*, 173 Ill. 331, 50 N. E. 660.

<sup>17</sup> *First National Bank v. Douglas County*, 3 Dillon 330.

<sup>17a</sup> *Covington v. First National Bank*, 198 U. S. 100, 49 L. ed. 963, 25 Sup. Ct. 562 (1905); *First National Bank v. Covington*, 129 Fed. 792 (1903).

<sup>17b</sup> *Citizens' National Bank v. Kentucky*, 217 U. S. 443, 54 L. ed. 832, 30 Sup. Ct. 532 (1910).

<sup>18</sup> *Merchants' National Bank of Toledo v. Cumming*, *Thompson's National Bank Cas.* 926. But see *Lacy v. McCafferty*, 215 Fed. 352 (1914).

<sup>18a</sup> *Whitback v. Mercantile Bank*, 127 U. S. 193, 32 L. ed. 118, 8 Sup. Ct. 1121 (1888).

Where the law gives no remedy against a State for the recovery of taxes paid under duress, a court of equity may enjoin their exaction, and may adjudicate at the same time as to the validity of both county and State taxes, where both are sought to be enforced under one warrant.<sup>19</sup>

A State may tax shares in the capital stock of a national bank, but cannot tax the capital of the bank when invested in government securities. Miller, J., says: "But we are of opinion that while Congress intended to limit State taxation to the shares of the bank, as distinguished from its capital, and to provide against a discrimination in taxing such bank shares unfavorable to them as compared with the shares of other corporations and with other moneyed capital, it did not intend to prescribe to the State the mode in which the tax should be collected."<sup>20</sup>

A statute which authorizes the taxation of the shares of a national bank after a certain special system is rendered void by a constitutional amendment which reads, "Property shall be assessed for taxes under general laws and by uniform rules, according to its true value."<sup>21</sup>

In assessing the shares of stock in a national bank, the shares must be assessed at their full market value, and not at their par value,<sup>22</sup> nor at their value as shown by the capital stock, the surplus fund and the undivided profits.<sup>22a</sup>

In taxing the shares of national banks the total valuation of all the shares at their true value, which is their exchangeable value in the market, must be ascertained; and from this is to be deducted the amount of the assessment on real estate and such other items as the statute permits to be deducted; each share is assessable on its *pro rata* of the balance.<sup>22b</sup>

<sup>19</sup> First National Bank of Omaha v. Douglas County, 3 Dillon 298.

<sup>20</sup> National Bank v. Commonwealth, 9 Wall. 353, 19 L. ed. 701; *Hershire v. First National Bank*, 35 Iowa 272; and see *Lionberger v. Rouse*, 9 Wall. 468, 19 L. ed. 721; *Lindsay v. First National Bank*, 156 U. S. 485, 39 L. ed. 505, 15 Sup. Ct. 472 (1895).

<sup>21</sup> State, North Ward National Bank of Newark v. City of Newark, 10 Vroom (N. J.) 380.

<sup>22</sup> *People ex rel. Williams v. Assessors of Albany*, 5 Thom. & C. (N. Y.) 155; *Bank v. Oxford*, 70 Miss. 513, 12 So. 203.

<sup>22a</sup> *National Bank of Commerce v. New Bedford*, 155 Mass. 313, 29 N. E. 532.

<sup>22b</sup> *Newark v. Tunis*, 81 N. J. L. 45, 78 Atl. 1066 (1911); *Camden v. Camden Safe Dep. Co.*, 84 N. J. L. 37, 85 Atl. 1026 (1913).

The exchangeable value in the market is not an invariable test of true value under any and all circumstances. *Newark v. Tunis*, 82 N. J. L.

When a national bank returns a value of its property at only 75 per cent of its face value and, with connivance of county commissioners, seeks to have all property in the county valued at only 75 per cent of its true value, it cannot complain because its own property is subsequently raised to its true value while other property is not so raised.<sup>22c</sup>

Shares of stock in a national bank are to be assessed at no greater rate than other moneyed capital in the hands of individuals. By the statute laws of New York the assessment must be made on the entire value of the shares, after deducting therefrom a sum proportionate to the ratio which the assessed value of the real estate bears to the whole capital stock.<sup>23</sup>

(c) The National Banking Act, Rev. Sts. § 5219, limits the power of the States to taxation upon the shares in national banks; and this cannot be evaded by ordering the collectors to include the value of the bank's property in the value of the shares. But a bill of complaint will be dismissed where it is not shown that the valuation of the shares by the assessors is excessive, no matter how incorrect was the method by which such valuation was arrived at.<sup>24</sup>

The shares of national banks must be ascertained, in some form, in order to determine their taxable value, and a State may authorize the appraisement of these shares for taxation at the current market value of the stock at the place where the bank is located.<sup>25</sup>

The capital of a national bank invested in government bonds should be deducted from the bank assets in determining the value of the shares of stock for purposes of taxation.<sup>25a</sup>

The value of a bank share depends upon the value of the bank's franchise, its capital, and property of all kinds, less the amount of its debts.<sup>25a</sup>

461, 81 Atl. 722 (1911). See *Ankeny v. Blakley*, 44 Or. 78, 74 Pac. 485 (1903).

<sup>22c</sup> *Chickasha National Bank v. Cloud*, 40 Okla. 623, 139 Pac. 1134 (1914).

<sup>23</sup> *People ex rel. Tradesmen's National Bank v. Commissioners of Taxes and Assessments*, 69 N. Y. 91.

<sup>24</sup> *St. Louis National Bank v. Papin*, 3 Cent. Law Jour. 669; *Thompson's National Bank Cas.* 326.

<sup>25</sup> *People v. Commissioners of Taxes and Assessments*, 94 U. S. 415, 24 L. ed. 164; *City of Richmond v. Scott*, 48 Ind. 568.

<sup>25a</sup> *Des Moines National Bank v. Des Moines*, 153 Iowa 336, 133 N. W. 767 (1911).

<sup>25a</sup> *Rosenberg v. Weekes*, 67 Tex. 578, 4 S. W. 899.

A national bank may be assessed for municipal or school taxes, although in the county where the bank is located all mortgages, judgments, recognizances, and moneys owing upon articles of agreement for the sale of real estate are exempt from taxation except for State purposes, the exemption being a partial one only.<sup>26</sup>

(c<sup>2</sup>) The act of Congress which prohibits the shares of a national bank from being assessed at a greater rate than other moneyed capital in the hands of individual citizens, does not prevent a national bank, whose capital is invested in United States bonds, from being taxed on its shares, although individual citizens of the State where the bank is located are not taxed on their government securities. The true construction of the act is, that the rate of taxation of the shares should be the same as, or not greater than, that established for the moneyed capital of the individual citizen which is subject to taxation.<sup>27</sup>

"The act of Congress was not intended to curtail the State power on the subject of taxation. It simply required that capital invested in national banks should not be taxed at a greater rate than [other] like property similarly invested. It was not intended to cut off the power to exempt particular kinds of property, if the legislature chose to do so." The discretionary power of State legislatures remains to a certain extent.<sup>28</sup>

(d) It has been decided by the Supreme Court of the United States, that under the act of 1864 (differing in this respect from the act of 1863) a State may tax the shares of shareholders in a national bank located within the State; provided that such shares be not taxed at a greater rate than is assessed upon the shares of any of the banks organized under the authority of the State.<sup>29</sup>

Neither is this rule affected by the fact that the capital of the bank is invested in government bonds not taxable by State authority.<sup>30</sup>

United States bonds held by a national bank as a part of its capital cannot be taxed by the State nor under its authority.<sup>30a</sup>

<sup>26</sup> *Hepburn v. School Directors*, 23 Wall. 480, 23 L. ed. 112.

<sup>27</sup> *People v. The Commissioners*, 4 Wall. 244, 18 L. ed. 344; *City of Richmond v. Scott*, 48 Ind. 568.

<sup>28</sup> *Adams v. Mayor, etc. of Nashville*, 16 Alb. Law Jour. 416.

<sup>29</sup> *Van Allen v. The Assessors*, 3 Wall. 573, 18 L. ed. 229. See *First National Bank v. Douglas County*, 124 Wis. 15, 102 N. W. 315 (1905).

<sup>30</sup> *Van Allen v. The Assessors*, 3 Wall. 583, 18 L. ed. 229. See *German American Savings Bank v. Burlington*, 118 Iowa 84, 91 N. W. 829 (1902); *National State Bank v. Burlington*, 119 Iowa 696, 94 N. W. 234 (1903); *First National Bank v. Independence*, 123 Iowa 482, 99 N. W. 142 (1904).

<sup>30a</sup> *Bank of Martinsburg v. State*, 58 W. Va. 559, 52 S. E. 494, 3 L. R. A.



But a tax on the capital of a State bank is not equivalent to a tax on the shares of a national bank, and taxation of these shares is not justified by the fact that a tax is imposed on the capital of the State banks. The possible inequality would at once appear in the case of the capital, or any large part thereof, of the State bank being invested in such a manner (*e. g.* in government bonds) as to escape taxation.<sup>31</sup> The Supreme Court have also gone very far in an effort to make the legislation of Congress conformable to the apparent exigencies of common sense, and have held, in effect, that a State may tax shares in national banks if it has done all in its power to tax State banks at the same rate, although it has not been able really to do so by reason of restrictions upon its power. There may be a great deal of wisdom and a sound respect for practical expediency in the decision rendered in the case of *Lionberger v. Rouse*,<sup>32</sup> but it is certainly very absurd law. It amounts simply to this. The State of Missouri did all it could to tax the State banks within its limits at the rate at which it taxed national banks; it succeeded in inducing all the State banks save two to reorganize on the national basis; but these two obstinately retained their State charters and continued to do business thereunder; these charters prevented the State from imposing a tax on these two banks in conformity with the tax imposed on the shares in the national banks located in the State. The court said, that since unfortunately the State could not do what it would like to, therefore it might be excused from doing so; and having done its best to comply with the provisions of the national statute, it might reap the advantages of compliance, though unable in fact to achieve it. In a word, the Supreme Court said that it was proper in this instance to accept the will for the deed, and Missouri was allowed to collect the tax from the national banks. The opinion is ingenious and plausible, but perfectly unsound. The case seems to fall practically within the principle that an exemption *in certain particular cases* does not affect the general power of taxing national banks.

(e) A State statute providing for the assessment of taxes against national banks was declared illegal by the court, for the reason that it imposed a tax on the shares of national banks, when State (N. S.) 584, n. (1905); *Beard v. People's Savings Bank*, 53 Ind. App. 185, 101 N. E. 325 (1913); *Des Moines National Bank v. Des Moines*, 153 Iowa 336, 133 N. W. 767 (1911).

<sup>31</sup> *Van Allen v. The Assessors*, 3 Wall. 573, 18 L. ed. 229.

<sup>32</sup> 9 Wall. 468, 19 L. ed. 721.

banks were only assessed on their capital. This law was then amended by a subsequent statute repealing "all acts and parts of acts inconsistent with this act." It was held that this latter enactment repealed the provisions for taxing the capital of State banks, and left the way clear and unobstructed for the assessment of taxes against the shares in national banks without violating section 41 of the National Banking Act.<sup>33</sup>

The shareholders in the Union National Bank complained that the bank had been taxed on its real estate, and that when the shares of stock were assessed, the value of the real estate should have been deducted from the gross value of the stock, it being so deducted in the assessment of the stock of all other banks owning real estate. They failed, however, to show that any injustice was done them by this process, since the sum total of stock and real estate assessed fell considerably below one half the cash value of the stock. The court refused to grant an injunction.<sup>34</sup>

The provision in section 41 of the act of 1864 requires that State taxes be imposed "at the place where the bank is located, and not elsewhere." *Held*, that the legislature of a State has a right to fix the *situs* of shares at its discretion, and may tax the shares at the place where the bank is located, whether the shareholders reside there or not.<sup>35</sup>

(f) By the act of 1864 shares in national banks may be taxed by the States, and are to be included in the valuation of the personal property of the holder, "in the assessment of taxes imposed by or under State authority, at the place where such bank is located, and not elsewhere." A State statute enacting that the assessment for taxation shall be made where the shareholders reside, independently of the locality of the bank, does not invalidate an assessment made upon the holder of shares in a national bank, located where the assessment is made, although in another case, arising upon a different state of facts, the statute might produce results in conflict with the act of Congress.<sup>36</sup>

A State statute enacting that stockholders in national banks

<sup>33</sup> *Morseman v. Younkin*, 27 Iowa 350.

<sup>34</sup> *Nickerson v. Kimball*, 1 Chic. Law Jour. 42; *Thompson's National Bank Cas.* 409.

<sup>35</sup> *First National Bank of Mendota v. Smith*, 65 Ill. 44; *Whitney et al., appellants, v. Ragsdale*, 33 Ind. 107; also *Nickerson v. Kimball*, 1 Chic. Law Jour. 42; *Thompson's National Bank Cas.* 409; *Greves v. Shaw*, 173 Mass. 205, 53 N. E. 372; *Union Bank v. City of Richmond*, 94 Va. 316, 26 S. E. 821.

<sup>36</sup> *Austin v. The Aldermen*, 7 Wall. 694, 19 L. ed. 224.

"shall be assessed and taxed on the value of their shares of stock therein in the county, town, or district where such bank or banking association is located, and not elsewhere, whether such stockholders reside in such town, county, or district or not, but not at any greater rate than is or may be assessed upon other moneyed capital in the hands of individuals in this State," is valid, and no violation of the constitutional rule of uniformity of taxation.<sup>37</sup>

The National Banking Act allows shares in a national bank to be taxed in such manner and place as the State may determine, and therefore a State statute is valid which provides for the taxation of national bank shares in the township where the bank is located, except where a stockholder resides in another township in the same county, and in that case that his shares shall be taxable in his own township. But under such a general statute law a village charter which authorizes the taxation of "all property, real and personal, within the limits of said village," does not authorize the taxation of the shares of a national bank located in the village, when the shareholder is a resident of another township in the same county.<sup>38</sup>

(g) By the constitution of North Carolina all property must be taxed, unless especially exempted in the constitution. Therefore shares in a national bank located within the State, held by a non-resident of the State, may be taxed without a special statute authority. "Neither the legislature nor the town corporation can exempt them from taxation without doing violence to the constitution."<sup>39</sup>

A State has no authority to assess a tax against a citizen of that State for shares owned by him in a national bank located in another State. It is constitutional for Congress to establish a national bank in any State, and to provide that its shares shall not be taxed by any other State.<sup>40</sup>

It is lawful for the State to enact that the taxes on shares in the capital stock of national banks, located within the State, shall be paid by the bank.<sup>41</sup>

<sup>37</sup> *Tappan b. Merchants' National Bank*, 19 Wall. 490, 22 L. ed. 189. See *Van Allen v. The Assessors*, 3 Wall. 573, 18 L. ed. 229; *People v. The Commissioners*, 4 Wall. 244, 18 L. ed. 344; *Hepburn v. School Directors*, 23 Wall. 480, 23 L. ed. 112.

<sup>38</sup> *Howell v. Village of Cassopolis*, 35 Mich. 471.

<sup>39</sup> *Kyle v. The Mayor, etc.*, 75 N. C. 445.

<sup>40</sup> *Flint v. Aldermen of Boston*, 99 Mass. 141.

<sup>41</sup> *First National Bank v. Douglas County*, 3 Dillon 330; *First National Bank v. Chehalis Co.*, 6 Wash. 64, 32 Pac. 1051.

Under Tennessee statutes, the bank has a right to pay taxes on stock for its stockholders and if the payment was under protest it may sue for and recover such taxes if illegally paid.<sup>41o</sup>

In Kansas, a national bank may pay the taxes assessed upon the shares of its different stockholders, and have a lien on such shares until it is reimbursed.<sup>41a</sup>

Under the statutes of Iowa, in order to make a national bank liable for a tax assessed against certain of its shareholders, it must be shown that the bank has, or has had, in its possession and control dividends or other money or property belonging to such delinquent shareholders.<sup>42</sup>

But in Kentucky the statute provides that a national bank shall be liable absolutely for the taxes upon shares.<sup>43</sup>

In North Dakota a national bank is neither authorized nor required to pay taxes assessed against its stockholders, and so the bank cannot maintain an action to restrain the collection of such taxes, or from seizing and selling property in satisfaction thereof especially where there has been a neglect to take advantage of the statutory method of correcting the abuse of valuation.<sup>43a</sup>

In West Virginia when a statute requires the bank to pay the tax on its stock, the bank becomes a trustee and may go to a court of equity to determine its duty for its protection.<sup>43b</sup>

The plaintiff purchased stock in a national bank on March 1. The purchase money had been assessed against the plaintiff on January 1. *Held*, that he could be assessed for the stock held by him on April 1, notwithstanding he had paid the taxes on the money with which the stock was purchased.<sup>44</sup>

(h) A statute of the State of Vermont required the cashier of each national bank within the State, as well as the cashiers of all other banks, to transmit to the clerks of the several towns

<sup>41o</sup> *State National Bank v. Memphis*, 116 Tenn. 641, 94 S. W. 606 (1906).

<sup>41a</sup> *National Bank v. Fisher*, 45 Kan. 726, 26 Pac. 482.

<sup>42</sup> *Hershire v. First National Bank*, 35 Iowa 272.

<sup>43</sup> See *supra*, *National Bank v. Commonwealth*, 9 Wall. 353, 19 L. ed. 701; *Hager v. Citizens' National Bank*, 127 Ky. 192, 105 S. W. 402 (1907); *Commonwealth v. Citizens' National Bank*, 117 Ky. 946, 80 S. W. 158 (1904); *Covington v. First National Bank*, 198 U. S. 100, 49 L. ed. 963, 25 Sup. Ct. 562 (1905); *Citizens' National Bank v. Kentucky*, 217 U. S. 443, 54 L. ed. 832, 30 Sup. Ct. 532 (1910).

<sup>43a</sup> *First National Bank v. Steenson*, 25 N. D. 629, 146 N. W. 1061 (1898).

<sup>43b</sup> *Charleston National Bank v. Melton*, 171 Fed. 743 (1909).

<sup>44</sup> *City of Richmond v. Scott*, 48 Ind. 568.

in the State in which any shareholder in the association should reside, a true list of the names of such shareholders, with the number of shares recorded in the name of each, and the amount of money actually paid in on account of each share. It was argued that the requirement in the act of Congress that each national bank should keep a list of its shareholders posted up in its business office covered the ground of this State enactment, and that therefore the State enactment was void, as trenching on the domain already lawfully occupied by Congressional legislation. The court, however, held otherwise, declaring the statute to be valid, and not in conflict with the act of Congress, which had no such purpose as the State statute, but was designed merely to furnish to the public dealing with the bank a knowledge of the names of its corporators, and to what extent they might be relied upon as giving safety to dealing with the bank. Whether the motive of this State requirement was to aid illegal taxation or not was said to be of no consequence. This especial obligation could be lawfully implied; when any taxation should be subsequently attempted, then the question of the legality of that taxation would be separately and properly raised.<sup>45</sup>

The absence of State legislation empowering some taxing officer to make demand upon national bank officers for a list of shares and shareholders, does not render section 5210 inoperative.<sup>45a</sup>

In West Virginia the bank officials must supply the county assessor with information regarding the capital employed or invested in the business.<sup>45b</sup>

And, in the same State, upon failure of the county assessor to assess the capital stock of a bank in the county where it is doing business, it becomes the duty of the shareholder to list his property for taxation.<sup>45c</sup>

In Kentucky the bank may be required to furnish information upon which the assessment of shares of its stock may be made.<sup>45d</sup>

Under the law in Washington a national bank is the trustee of its shareholders for the purpose of returning the assessable property to the assessor, and of paying the taxes upon the same,

<sup>45</sup> *Waite v. Dowley*, 94 U. S. 527, 24 L. ed. 181.

<sup>45a</sup> *Paul v. McGraw*, 3 Wash. 296, 28 Pac. 532.

<sup>45b</sup> *Bank v. County Court*, 36 W. Va. 341, 15 S. E. 78.

<sup>45c</sup> *Watson v. Town of Fairmont*, 38 W. Va. 183, 18 S. E. 467.

<sup>45d</sup> *Hager v. Citizens' National Bank*, 127 Ky. 192, 105 S. W. 403 (1907). See *Citizens' National Bank v. Kentucky*, 217 U. S. 443, 54 L. ed. 832, 30 Sup. Ct. 532 (1910).

and it may maintain an action in its own name to secure relief against excessive taxation of its capital stock, and it need not go before the board of equalization to secure relief when the assessor fraudulently increased the assessment without its knowledge.<sup>45e</sup>

The bank has a lien upon the shares of stock for the taxes which it has paid.<sup>45f</sup>

(i) By a statute of Massachusetts, it is provided that every shareholder in a national bank shall every year give notice to the bank of his place of residence; and if he neglects to do this his shares are to be made subject to taxation in the city or town where the bank is located, as well as in the city or town where he resides. One who was a resident of B. paid, under protest, a tax assessed against him as a resident of A. *Held*, in an action by him to recover the amount so paid, that the *onus* was on the plaintiff to show that the statement made by him to the cashiers of the bank, as to his place of residence, was not intentionally false.<sup>46</sup>

By a statute of Massachusetts concerning the taxation of bank shares, it is provided, "that such shares owned by non-residents of this Commonwealth shall be assessed to the owners thereof in the cities or towns where such banks are located, and not elsewhere; that the tax shall be a lien on their shares; that the value of such shares shall be omitted from the valuation upon which the rate is to be based; and that the proceeds of the tax upon such shares, when collected, shall be paid over by the treasurer of the town or city to the State treasurer." *Held*, not unconstitutional, as being in violation of the National Banking Act, the word "place" in the U. S. statute meaning the State where the bank was located;<sup>47</sup> that it did not impose a greater rate than was assessed upon other moneyed capital in the hand of individual citizens, and was not a disproportionate tax; and that no objection could lie to the fact that it is retrospective in its operation.<sup>48</sup>

The fact that the shares are assessed in the name of the bank, will not invalidate the lien, nor relieve the respective stockholders from the payment of the tax for which each is liable.<sup>48a</sup>

<sup>45e</sup> *Citizens' National Bank v. Columbia County*, 23 Wash. 441, 36 Pac. 209 (1900); *Ladd v. Gilson*, 26 Wash. 79, 66 Pac. 126 (1901).

<sup>45f</sup> *Jefferson County v. First National Bank*, 38 Wash. 255, 80 Pac. 449 (1905).

<sup>46</sup> *Goldsbury v. Inhabitants of Warwick*, 112 Mass. 384.

<sup>47</sup> *Austin v. Board of Aldermen of Boston*, 14 Allen (Mass.) 359.

<sup>48</sup> *Provident Institution for Savings v. City of Boston*, 101 Mass. 575.

<sup>48a</sup> *Small v. City*, 128 Ind. 231, 27 N. E. 500.

(j) A State statute which exempts from taxation "all shares of the capital stock of any company or corporation which is required to list its property for taxation in this State" has no application to the shares of a national bank the property of which consists of United States government bonds.<sup>49</sup>

Where by the charter of a city assessments for taxes should be made on April 1, and an act is passed by the State that for a certain year banks should be taxed as of July 1, it is necessary for the party so assessed on his shares in a national bank, when calling upon a court of equity for relief, to allege and prove that he has been injured thereby; that by reason thereof his shares have been valued too high, or that there was a difference in the value on the two specified days, whereby he had been compelled to pay a double or greater tax. The act does not *per se* violate the Constitution, nor did the National Banking Act intend to prescribe a mode by which alone the State could tax the shares; that being for State legislation to determine, subject to certain restrictions. Therefore, where it had been customary to make assessments upon the capital stock of national banks for revenue purposes, and these taxes were in process of collection, a State statute enacting that they should be vacated, and that, to supply the deficiency in the revenue, the assessors should be required to assess the shareholders in the banks upon the value of their shares, is not unconstitutional. "To get at the shares, it would be proper to require them to be included in the valuation of the personal property; not that they should, but might, occupy a different column in the list. It cannot be understood to mean . . . that they should be included in such valuation, to enable the shareholders to deduct from their value such debts as they might owe, as required by the general revenue law."<sup>50</sup>

(k) By statute of Wisconsin taxes were imposed upon shares in national banks. That law makes the taxes which it imposes a lien upon the shares of stock taxed. Hence where the defendant sold national bank shares to the plaintiff, on which, without the plaintiff's knowledge, there was an unpaid tax due, and the tax was afterwards paid by the bank, as by law provided, it was held that the plaintiff could recover damages from the defendant to the amount of the tax so paid.<sup>51</sup>

<sup>49</sup> *McIver v. Robinson*, 53 Ala. 456.

<sup>50</sup> *McVeagh v. City of Chicago*, 49 Ill. 318.

<sup>51</sup> *Simmons v. Aldrich*, 41 Wis. 241.

Replevin will lie to recover a package of bank bills belonging to a national bank, which had been taken by the county treasurer in satisfaction of a tax assessed against shareholders of the bank.<sup>52</sup>

By the general tax law of the State of New York it is provided that each individual shall be assessed for the full value of all the taxable personal property owned by such person, after deducting the just debts owing by him. But it was held that this did not permit the owners of shares in a national bank to deduct debts from the assessed value of their shares taxed under a subsequent statute law providing that such shares should be taxed at their value.<sup>53</sup>

The meaning to be put upon the words "*place* where the bank is located", occurring in section 41, has caused much litigation, and the decisions have been far from harmonious.<sup>54</sup> The discussion has now been put at rest by the amendment of February 10, 1868, which enacts that "*place*" shall be construed to intend "*State*."

(*l*) **Alabama.** — National Banks, being an instrumentality of the general government, are not subject to taxation by the States except in so far as Congress may expressly permit.<sup>55</sup>

**Idaho.** — Section 5219 of the U. S. Rev. Sts. is the measure of the power of a state to tax national banks, their property or their franchise; and any tax in excess and not in conformity to such section is void. It does not authorize the taxation of the capital stock of national bank.<sup>55a</sup>

**Indiana.** — The Federal and the Indiana statutes construed together indicate that real estate owned by a national bank must be assessed as realty in the township where situated, and not as a part of the capital stock of the bank.<sup>56</sup>

The act of Congress approved February 10, 1868, places but one limitation on the taxing power of the State; namely, that

<sup>52</sup> *First National Bank v. Hershire*, 31 Iowa 18.

<sup>53</sup> *People ex rel. Cagger v. Dolan*, 36 N. Y. 59. See *City National Bank v. Paducah*, 5 Cent. Law Jour. 347; *Thompson's National Bank Cas.* 300.

<sup>54</sup> See *Austin v. The Aldermen*, 7 Wall. 694, 19 L. ed. 224; *State v. Haight*, 2 Vroom (N. J.) 399; *State v. Hart*, *id.*, 434; *State v. Cook*, 3 *id.*, 347; *Opinion of Justices*, 53 Me. 594; *Packard v. Lewiston*, 55 *id.*, 456; *Mayor v. Thomas*, 5 Cold. (Tenn.) 600.

<sup>55</sup> *National Commercial Bank of Mobile v. Mobile*, 62 Ala. 284. See also *Daly Bank & Trust Co. v. Board of Com'rs*, 33 Mont. 101, 81 Pac. 950 (1905).

<sup>55a</sup> *Weisner National Bank v. Jeffreys*, 14 Idaho 659, 95 Pac. 23 (1908).

<sup>56</sup> *Loftin v. Citizens' National Bank*, 85 Ind. 341.



the shares of stock in national banks shall not be taxed at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State.<sup>57</sup>

(m) **Iowa.** — While the capital of national banks cannot be taxed by State authority, the shares of shareholders may be, in a rate not exceeding that imposed upon the shares of banks organized in and by authority of such State. But if the laws of the State merely provide for the taxation of the capital of its own banks, and not of the shares held therein, a subsequent or further provision for the taxation of the shares of national banks is not in conformity with, and is unauthorized by, the act of Congress providing for the organization of national banks, and is therefore invalid.<sup>58</sup>

Under section 41 of the act of June 3d, 1864, authorizing the organization of national banks, none of the property of such banks is taxable by State, county, or municipal authority, except the real estate of the bank, and the shares of its stockholders. The duties provided for in said act were designed to be in lieu of all existing taxes.<sup>59</sup>

Where a portion of the capital stock of a national bank is invested in real estate, and such real estate is assessed for taxation, the stock of said bank can be taxed to the extent of its market value as may remain after deducting therefrom the actual value of said real estate.<sup>59a</sup>

**Kentucky.** — An act which provides for an assessment of the shares of stock of a national bank, and not for the assessment of their assets, is in express violation of the National Banking Act.<sup>59b</sup>

When national bank shares are taxed in the hands of the owners, while the mode of taxing other banking institutions is by the imposition of a franchise tax there is not necessarily a discrimination against national bank shares.<sup>59c</sup>

A State may, with certain restrictions, provide how shares in a national bank shall be taxed.<sup>59c</sup>

(n) **Massachusetts.** — The bank shares of the estate of a deceased person must be assessed at the place where all the other property of the deceased is assessed. Under chapter 321 of the

<sup>57</sup> *Stiltz v. Tutewiler*, 1 Wilson (Ind.) 507.

<sup>58</sup> *Hubbard v. Board of Supervisors*, 23 Iowa 130.

<sup>59</sup> *National State Bank v. Young*, 25 Iowa 311.

<sup>59a</sup> *Bank of Albia v. City Council*, 86 Iowa 28, 52 N. W. 334.

<sup>59b</sup> *Hager v. Citizens' National Bank*, 127 Ky. 192, 105 S. W. 402 (1907).

<sup>59c</sup> *Scobee v. Bean*, 109 Ky. 526, 59 S. W. 860 (1900).

laws of 1872, the city of Boston had no right to assess any of the shares of such stock (the residence of the deceased having been in Canton) at the residence of the executor, or at the locality of the bank.<sup>60</sup>

**Maryland.** — By the provisions of its charter, a State bank was to pay twenty cents upon every one hundred dollars of stock paid in during the preceding year. In 1865 the bank surrendered its charter, and reorganized as a national bank. It was subsequently sued by the State for dues maturing after reorganization. Held, (1) that under the State law the bank had a right to surrender its charter; (2) that the\*bonus of twenty cents was a price paid for the right of exercising the powers and privileges of the charter, which, after its surrender, the State had no right to exact; (3) that after the reorganization as a national bank, the bonus could only be exacted as a tax, and that the State had no right to impose.<sup>61</sup>

Double taxation is unlawful; wherefore the realty *or* capital stock may be taxed, but not both.<sup>62</sup>

(o) **Minnesota.** — After the shares have been assessed without deducting the realty and the tax paid, the banking office and lot cannot be taxed to the bank.<sup>63</sup>

**Missouri.** — National banks derive their authority from the United States, and cannot be taxed in any way except as expressly authorized. The capital stock as such cannot be taxed, nor can a city exact a license fee from a national bank.<sup>64</sup>

Assessment of personal taxes to be paid by a national bank must be against the stockholders and not *in solido* against the bank as a corporation.<sup>64a</sup>

(p) **New Hampshire.** — The surplus fund which a national bank was required by the United States General Statutes, § 5199, to reserve from its net profits, is not excluded in the valuation of its shares for taxation.<sup>65</sup>

<sup>60</sup> *Revere v. City of Boston*, 123 Mass. 357.

<sup>61</sup> *State v. National Bank of Baltimore*, 33 Md. 75.

<sup>62</sup> *County Commissioners of Frederick County v. Farmers & Mechanics' National Bank of Frederick*, 48 Md. 117.

<sup>63</sup> *Board of Commissioner of Rice County v. Citizens' National Bank*, 23 Minn. 280.

<sup>64</sup> *City of Carthage v. First National Bank of Carthage*, 71 Mo. 508. See also *Mayor of Macon v. First National Bank of Macon*, 59 Ga. 648, and *National Bank v. Mayor*, 8 Heisk. (Tenn.) 814.

<sup>64a</sup> *State v. First National Bank*, 180 Mo. 717, 79 S. W. 943 (9104).

<sup>65</sup> *Stafford National Bank v. Dover*, 58 N. H. 316.

**New Jersey.** — The restriction on the power of the States in the matter of taxation of national banks does not arise from the fact that they are created corporations under the act of Congress. The States may lawfully tax the property merely of a corporation created by act of Congress, in common with other property of the same description throughout the State.

(*q*) But to the extent that such property is invested in the securities of the Federal Government, it is beyond the power of the States to tax it against the corporation without permission of Congress, for the reason that taxation in that respect would be, indirectly, a tax upon the credit and securities of the Federal Government.

The power of the States to tax, in the hands of stockholders, the stock of national banks which is invested in Federal securities is derived exclusively from the authority conferred by Congress. By the act of 1864, as amended in 1868, power is granted to the States to tax the shares of the stock of national banks by including them in the valuation of the personal property of the owner. The only restriction on this power of taxation is, that it shall not be at any greater rate than is assessed on other moneyed capital in the hands of individual citizens of the State, and that shares owned by non-residents of the State shall be taxed in the city or town where the bank is located. The mode in which the tax shall be assessed and collected, and the place where it shall be laid on resident stockholders, are left to the discretion of the legislatures of the States in which the banks are respectively located.<sup>66</sup>

But it was held in the Court of Appeals, that the resident stockholder had a right, under the laws of New Jersey, to have the shares of national bank stock standing in his name assessed to him in the township or ward in which he resides.<sup>67</sup>

(*r*) A national bank located in New Jersey had an office in Philadelphia, where deposits were received. *Held*, that said deposits were not liable to tax in Philadelphia.<sup>68</sup>

In **New Mexico** the assessment of capital stock of a national bank must be against each individual shareholder and not as a whole against the bank.<sup>68a</sup>

**New York.** — The act providing that the taxation of shares of stock of national banks "shall not be at a greater rate than is

<sup>66</sup> *State v. Newark*, 39 N. J. (10 Vroom) 388.

<sup>67</sup> *State v. Newark*, 40 N. J. (11 Vroom) 558.

<sup>68</sup> *National State Bank of Camden v. Pierce*, 18 Alb. Law Jour. 16.

<sup>68a</sup> *First National Bank v. Albright*, 13 N. M. 514, 86 Pac. 548 (1906), affirmed in 208 U. S. 548, 5 L. ed. 614, 28 Sup. Ct. 349 (1908).

assessed upon other moneyed capital in the hands of individual citizens " requires that no greater percentage of tax shall be levied ; it does not apply to an over valuation. The fact that the capital of the bank is invested in United States securities does not prevent the taxing of the shares.

No deduction need be made for the debts of the owners of such shares.<sup>69</sup>

The actual and not the par value is the standard of taxation in assessing shares of a national bank. The fact that the capital of the bank is invested in United States bonds, does not affect the valuation. The actual value of the stock, diminished by the proportionate value of the real estate owned by the bank, furnishes the proper sum upon which to assess the tax.<sup>70</sup>

The state is not obliged to apply the same system to the taxation of national banks that it applies in the taxation of the other property, provided there is no inequality or unfriendly discrimination.<sup>70a</sup>

(s) **North Carolina.** — National bank shares may be assessed at the residence of the owners, or at the location of the bank, as the legislature of the State may determine.<sup>71</sup>

**North Dakota.** — Shareholders and the bank are separate entities for the purpose of taxation, and the assessment to the stockholders of their share of stock in a national bank without deducting from its capital the amount invested in real estate assessed to the bank like other real estate in the district, does not constitute excessive or double taxation.<sup>71a</sup>

**Ohio.** — National bank stock cannot be assessed without listing or mentioning the shareholders.<sup>71b</sup>

**Oregon.** — Any system that exacts from the owner of shares in a national bank a greater tax in proportion to their actual value than it does from the owner of other moneyed capital similarly invested is within the prohibition of U. S. Rev. Sts. § 5219.<sup>71c</sup>

<sup>69</sup> *Williams v. Weaver*, 75 N. Y. 30.

<sup>70</sup> *People v. Commissioners*, 8 Hun (N. Y.) 536.

<sup>70a</sup> *Bridgeport Savings Bank v. Feitner*, 191 N. Y. 88, 83 N. E. 592 (1908).

<sup>71</sup> *Burie v. Commissioners of Fayetteville*, 79 N. C. 267.

<sup>71a</sup> *In re First National Bank of Hillsboro*, 25 N. D. 635, 146 N. W. 1064, 1915 C. L. R. A. 386, n.

<sup>71b</sup> *Farmers' and Traders' National Bank v. Hoffman*, 93 Iowa 119, 61 N. W. 418.

<sup>71c</sup> *Ankeny v. Blakley*, 44 Or. 78, 74 Pac. 485 (1903).

**Pennsylvania.** — A corporation, while in a transition state from its original character as a State bank to that of a national bank, is subject to State taxation.<sup>72</sup>

**South Carolina.** — There can be no increase of the capital of a national bank until the Comptroller approves thereof, and issues his certificate under the banking act, section 13. Until then, new shares are not taxable.<sup>73</sup>

Taxes may be collected of the stockholders of a national bank, but not of the bank.<sup>73a</sup>

**Texas.** — Under the laws in force in 1876, a national bank was not liable to pay State and county taxes for that year assessed on shares of stock in the bank not owned by it, but by individual shareholders.<sup>74</sup>

The statutes of Texas relating to taxation do not contemplate that real estate belonging to national banks shall be taxed, although shares of national bank stock may be taxed.<sup>74a</sup>

All the statutes of Texas which levy a tax upon any property whatever except shares in national banks are wholly inapplicable to these institutions.<sup>74b</sup>

All the property, both real and personal, of a bank chartered under the laws of Texas is subject to taxation, but the shares of such a bank, being but evidence of an interest in property already taxed, cannot be taxed.<sup>74c</sup>

If a bank has to its credit by another bank an amount of money made up of U. S. treasury notes, subject to draft, such money would not be treasury notes in the hands of such other bank, but merely credits to that amount, subject to taxation as other credits.<sup>74d</sup>

The stock of national banks may be assessed against the owners thereof but not against the bank.<sup>74e</sup> And the board of equalization cannot, without the bank's consent, augment its conceded liability by adding other personal property to its rendition, or

<sup>72</sup> *Commonwealth v. Manufacturers' & Mechanics' Bank*, 2 Pearson (Pa.) 386.

<sup>73</sup> *Charleston v. People's National Bank*, 5 Rich. L. (S. C.) 103.

<sup>73a</sup> *Fourth National Bank v. Greenville*, 91 S. C. 81, 74 S. E. 126 (1911).

<sup>74</sup> *Waco National Bank v. Rogers*, 51 Tex. 606.

<sup>74a</sup> *Rosenberg v. Weeks*, 67 Tex. 578, 4 S. W. 899.

<sup>74b</sup> *Ibid.*

<sup>74c</sup> *Gillespie v. Gaston and Thomas*, 67 Tex. 599, 4 S. W. 248.

<sup>74d</sup> *Griffin v. Heard*, 78 Tex. 607, 14 S. W. 892.

<sup>74e</sup> *First National Bank v. Lampasas*, 33 Tex. Civ. App. 530, 78 S. W. 42 (1903).

raising the value of that which has been rendered.<sup>74e</sup> Nor is the bank liable for a penalty when it tendered payment of taxes before the penalty accrued.<sup>74e</sup>

An owner of national bank stock cannot deduct his indebtedness from the value of the stock for the purpose of taxation.<sup>74f</sup>

**Vermont.** — There can be no taxation of a national bank without the consent of Congress, and the only taxation permitted is upon the real estate of the bank and its shares of stock as the property of its stockholders, and a bank's franchise cannot be taxed in lieu of a tax on the shares.<sup>74g</sup>

Property may be classified for the purposes of taxation if based upon a distinction which bears a just relation to the purposes of the enactment.<sup>74g</sup>

**Washington.** — Under a code requiring that stock in a national bank shall be assessed to its owners, an assessment of the same to the bank is invalid and cannot be levied upon the real estate of the bank, even though the code provides that the bank shall pay the taxes to the collector and may have a lien on the stock therefor.<sup>74h</sup> Business property investment bonds held by a national bank are real estate within the meaning of the code.<sup>74i</sup>

**Wisconsin.** — Real estate belonging to a national bank which is clearly shown to have been acquired with its capital and constitutes a part of it is exempt from taxation.<sup>74j</sup>

(*t*) **United States.** — The territories possess the same power of taxing national banks that the States enjoy.<sup>74k</sup>

Where a statute provides for the assessment of the shares of a corporation at "their full and true value", deducting the proportional value of the real estate owned by the corporation, the just assessment will include the surplus or undivided profits of the corporation.<sup>75</sup>

The taxing power, so far as it is reserved to the States, and

<sup>74f</sup> *Primm v. Fort*, 23 Tex. Civ. App. 605, 57 S. W. 86 (1900).

<sup>74g</sup> *State v. Clement National Bank*, 84 Vt. 167, 78 Atl. 944, 1912D Ann. Cas. 22, n.

<sup>74h</sup> *Jefferson County v. First National Bank*, 38 Wash. 255, 80 Pac. 449 (1905).

<sup>74i</sup> *Dexter Horton National Bank v. McKenzie*, 69 Wash. 314, 124 Pac. 915 (1912).

<sup>74j</sup> *First National Bank v. Douglas County*, 124 Wis. 15, 102 N. W. 315 (1905).

<sup>74k</sup> *Talbott v. Silver Bow County*, 139 U. S. 438, 35 L. ed. 210, 11 Sup. Ct. 594 (1891); *First National Bank v. Albright*, 13 N. M. 514, 86 Pac. 548 (1906).

<sup>75</sup> *People v. Commissioners*, 4 L. & E. Rep. 213 (U. S. S. C.).

used within constitutional limits, cannot be controlled or restrained by the United States courts, the prudence of its exercise not being a judicial question. But a State tax on the loans of the Federal Government is a restriction upon the constitutional power of the United States to borrow money, and if the States had such a right, being in its nature unlimited, it might be so used as to defeat the Federal power altogether.

A tax on the nominal capital of a bank without regard to the nature or value of the property composing it, is annexed to the franchise as a royalty for the grant, and not a burden imposed on the property itself.<sup>76</sup>

A tax on the capital of a bank is not the same thing as a tax upon the shares of which the capital is composed.<sup>76a</sup> And when a State imposes on the State banks a tax on their *capital*, (the *shares* in the hands of the shareholders being exempt from taxation,) it cannot lay a tax on the shares of national banks.<sup>77</sup>

Under the Internal Revenue Act of July, 1870, interest paid and dividends declared during the last five months of the year 1870 are taxable, as well as those declared during the year 1871, it appearing that income of other sorts was meant to be so taxed, and there appearing to be no good reason why income derived through corporations should not be taxed like income generally.<sup>78</sup>

The exemption of savings bank deposits does not affect the rights of a State to tax national bank stock, although such stock is in the hands of savings banks and purchased by them with their deposits.<sup>78a</sup>

(u) Legal tender notes of the United States cannot be taxed in the hands of a bank. An interesting question under this rule arose in Louisiana; a bank had one million capital stock; it was assessed \$200,000 on its real estate, and \$700,000 on its capital or money at interest. The bank had three million more in deposits and other debts due from it. It had also \$974,000 in legal tenders, and claimed that these were a part of its capital, and that therefore the \$700,000 assessment was wrongful. The court said that the original capital was probably loaned out. The bank had notes and bills discounted to the amount of nearly two millions, and the legal tenders were just as applicable to its deposits

<sup>76</sup> *People v. Commissioners of Taxes*, 2 Black. 620.

<sup>76a</sup> *Union Bank v. City of Richmond*, 94 Va. 316, 26 S. E. 821.

<sup>77</sup> *Bradley v. The People*, 4 Wall. 459, 18 L. ed. 433.

<sup>78</sup> *Blake v. National Banks*, 33 Wall. 307, 23 L. ed. 119.

<sup>78a</sup> *Bank of Redemption v. Boston*, 125 U. S. 60, 31 L. ed. 689, 8 Sup. Ct. 772.

and other obligations as to its stock, and the bank could not be allowed to say that they constituted its capital.<sup>79</sup>

A bank may not procure treasury notes for the special purpose of avoiding taxation.<sup>79a</sup>

Shareholders in national banks may be taxed by the State laws at a greater rate than is assessed upon shareholders in other than moneyed corporations without violation of U. S. Rev. Sts. § 5219.<sup>80</sup>

The tax imposed by U. S. Rev. Sts. § 3413, on notes of a municipality held by any bank, is simply on their use as a circulating medium, and is constitutional.<sup>81</sup>

Where taxing officers have assessed national bank shares at full value, but other capital far below its true value, a court of equity will, on tender of the proper sum, enjoin the State authorities from collecting the remainder.<sup>82</sup>

Personal property of an insolvent national bank in the hands of a receiver appointed under U. S. Rev. Sts. § 5234, is exempt from State taxation.<sup>83</sup>

A city's assessment of the capital of a banking company was held lawful; the bank failing to show that the capital not invested in real estate consisted of United States legal tender notes.<sup>84</sup>

Certificates of indebtedness are not taxable as "circulation" under the U. S. Rev. Sts., unless intended to be used as money.<sup>85</sup>

United States securities cannot be taxed by a state.<sup>85a</sup>

State taxes, imposed or contemplated to be assessed on the franchise or intangible property of a bank, are illegal and cannot be upheld as being equivalent to a tax on the shares of stock in the names of the shareholders.<sup>85a</sup>

<sup>79</sup> *New Orleans Canal & Banking Co. v. City of New Orleans*, 99 U. S. 97, 25 L. ed. 409.

<sup>79a</sup> *Griffin v. Heard*, 78 Tex. 607, 14 S. W. 892.

<sup>80</sup> *First National Bank of Utica v. Waters*, 19 Blatchf. 242.

<sup>81</sup> *Merchants' National Bank of Little Rock (Ark.) v. United States*, 101 U. S. 1, 25 L. ed. 979.

<sup>82</sup> *Pelton v. Commercial National Bank of Cleveland*, 101 U. S. 143, 25 L. ed. 901; *Mercantile National Bank v. New York*, 172 N. Y. 35, 64 N. E. 756 (1902).

<sup>83</sup> *Rosenblatt v. Johnston*, 104 U. S. 462, 26 L. ed. 832.

<sup>84</sup> *New Orleans Canal & Banking Co. v. New Orleans*, 99 U. S. 97, 25 L. ed. 409.

<sup>85</sup> *United States v. Wilson*, 106 U. S. 620, 27 L. ed. 310, 2 Sup. Ct. 85.

<sup>85a</sup> *Home Savings Bank v. Des Moines*, 205 U. S. 503, 51 L. ed. 901, 27 Sup. Ct. 571 (1906).

<sup>85a</sup> *First National Bank v. City of Louisville*, 174 U. S. 438, 43 L. ed. 1038, 19 Sup. Ct. 876 (1899); *Graves County v. First National Bank*, 108 Ky. 194, 56 S. W. 16 (1900).



But a tax upon deposits in a national bank to be paid by the depositors is not a tax upon the bank itself, its property or franchises.<sup>85b</sup>

(v) A *national* bank may, on behalf of its shareholders, bring a bill to enjoin the collection of taxes laid upon assessments<sup>85c</sup> made in violation of the U. S. Rev. Sts. § 5219, requiring the shares to be assessed "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens."<sup>86</sup>

A bill to enjoin a tax on national bank shares for *discrimination, etc.*, must allege that the shares are valued higher than other moneyed capital *generally*, and it is not sufficient to allege that such is the fact in *particular instances*.<sup>87</sup>

A State law which does not give the shareholders the benefit of all deductions to which they are entitled is only voidable, and so where the amount of the tax which they should pay, if all proper deductions were allowed, is determinable, neither they nor the bank on their behalf can maintain an action in equity to restrain the collection of the entire tax. Nor will a lack of notice take away the jurisdiction to make the assessment.<sup>87a</sup>

Before a State statute which denies all right in taxation to deduct debt from stock in national banks but allows such deductions from other investments can be held as a violation of U. S. Rev. Sts. § 5219, it must appear that such other moneyed capital exists, and in such amount as to operate as a discrimination against such banks, and that it is of such a character as to come into competition with national banks.<sup>87b</sup>

Section 5219 of the U. S. Rev. Sts., protecting national banks from injurious discrimination, does not limit the standard of comparison to the "moneyed capital" invested in the "incorporated banks" of a State, but extends to all "moneyed capital in the hands of individual citizens of the State", and in

<sup>85b</sup> *Clement National Bank v. Vermont*, 231 U. S. 120, 58 L. ed. 147, 34 Sup. Ct. 31 (1913).

<sup>85c</sup> But until the assessment is made and a tax levied thereon no one is injured and suit will not lie to restrain the assessment. *First National Bank v. Albright*, 13 N. M. 514, 86 Pac. 548 (1906), affirmed in 208 U. S. 548, 52 L. ed. 614, 28 Sup. Ct. 349 (1908).

<sup>86</sup> *National Albany Exchange Bank v. Wells*, 18 Blatchf. 478.

<sup>87</sup> *Chicago Bank v. Farwell*, 10 Bissell 270.

<sup>87a</sup> *People's National Bank v. Mayre*, 191 U. S. 272, 48 L. ed. 180, 24 Sup. Ct. 68 (1903).

<sup>87b</sup> *West Virginia National Bank v. Dunkle*, 65 W. Va. 210, 64 S. E. 531 (1909).

order to compliance equalization must extend accordingly; and this although the bank shares are assessed *below* "their true value in money."<sup>88</sup>

If a dividend has been declared, the tax on dividends "declared . . . as a part of the earnings", etc. (Act of 1866, 14 U. S. Stat. at Large, 138) is assessable, although it appears afterwards that, owing to a defalcation, the dividend never was earned.<sup>89</sup>

*The real,<sup>89a</sup> but not the personal, estate of a national bank may be subjected to a State tax.*<sup>89a</sup>

The Kentucky tax of fifty cents a share on national bank stock includes the stockholder's interest in the surplus and undivided profits, as well as the authorized capital and assets.<sup>90</sup>

(w) Under 13 U. S. Stat. at Large, 283, §§ 120, 121, the duty of five per cent on bank dividends can be recovered only when sums alleged to be dividends have been declared as such, or have been added to the bank's surplus or contingent fund. *Where a dividend was declared in ignorance of losses afterwards discovered, these losses may be estimated in determining the amount due the United States.*<sup>91</sup>

When a bank carried an accumulated fund on its books under the head of profit and loss and used it in its business like other capital, it is not "surplus" but an accretion to capital and subject to federal taxation under Act of June 13, 1898 c. 448, § 2 (30 Stat. 448).<sup>91a</sup>

Chapter 761 of the New York *Laws*, 1866, as to the tax on bank stock, *contravenes the act of Congress* thereon, so far as not permitting a stockholder of a national bank to *deduct* the amount of his debts from the value while the *owner of other property can so deduct*. But the tax officers act within their authority until notified that he has such debts.<sup>92</sup>

<sup>88</sup> First National Bank of Toledo v. Lucas County Treasurer, 25 Fed. 749.

<sup>89</sup> United States v. Central National Bank, 24 Fed. 577.

<sup>89a</sup> The real estate of a national bank must be assessed against the bank. First National Bank v. Albright, 13 N. Mex. 514, 86 Pac. 548 (1906).

<sup>89a</sup> City and County of San Francisco v. Crocker-Woolworth National Bank, 92 Fed. 273 (1899); First National Bank v. Lampasas, 33 Tex. Civ. App. 530, 78 S. W. 42 (1903); Illinois National Bank v. Kinsella, 201 Ill. 31, 66 N. E. 338 (1903).

<sup>90</sup> Covington City National Bank v. City of Covington, 21 Fed. 484.

<sup>91</sup> United States v. Central National Bank, 15 Fed. 222.

<sup>91a</sup> Leather Mfrs'. National Bank v. Treat, 128 Fed. 262 (1904).

<sup>92</sup> Supervisors of Albany County v. Stanley, 105 U. S. 305, 26 L. ed. 1044.

The exemption from county taxation of property considerable in quantity and value, consisting of railroad securities, shares of stock in corporations liable to State taxation, mortgages, judgments, recognizances, money due on contracts for the sale of land, and corporation loans taxable by the State, constitutes an unlawful discrimination against national bank shares.<sup>93</sup>

(x) The courts relieve from inequalities in the valuation of property for taxation only when it appears that there was an *intentional discrimination*, and not merely an error in judgment of the assessing officer.<sup>93a</sup>

Shares in national banks may be taxed at their *true money value*, both under United States and Ohio laws.

"*Other moneyed capital*", in U. S. Rev. Sts. § 5219, refers to other *taxable* moneyed capital. It signifies capital employed in the operation of banking and otherwise used as money as a source of profit;<sup>93aa</sup> and includes only capital which comes in competition with that invested in national banks.<sup>93ab</sup>

The non-taxation of "credits" is not a ground upon which the tax assessed upon the capital stock of a national bank will be enjoined. Such non-taxation does not constitute an unjust discrimination against the moneyed capital of such institution.<sup>93a</sup>

The fact that under the laws of California shares of stock in state banks and other moneyed corporations are not permitted to be assessed and taxed is not sufficient to show that under Pol. Code §§ 3609, 3610, requiring the assessment and taxation of national banks, there is any discrimination against national banks, provided a different method has been adopted by the state for the assessment and taxation of the property of such corporations of all those elements embraced in the assessment of shares in national banks.<sup>93b</sup> But if there is any material discrimination against national banks, such as taxing the value of its intangible elements when such elements of a state bank are not taxed, there is an unjust discrimination and the tax is illegal.<sup>93c</sup>

<sup>93</sup> Boyer v. Boyer, 113 U. S. 689, 28 L. ed. 1089, 5 Sup. Ct. 706.

<sup>93a</sup> Lacy v. M'Cafferty, 215 Fed. 352 (1914); Mercantile National Bank v. New York, 172 N. Y. 35, 64 N. E. 756 (1902).

<sup>93aa</sup> Ankeny v. Blakley, 44 Or. 78, 74 Pac. 485 (1903).

<sup>93ab</sup> Illinois National Bank v. Kinsella, 201 Ill. 31, 66 N. E. 338 (1903).

<sup>93a</sup> First National Bank v. Chehalis Co., 6 Wash. 64, 32 Pac. 1051.

<sup>93b</sup> Crocker v. Scott, 149 Cal. 575, 87 Pac. 102 (1906).

The method of taxing is immaterial if there is no discrimination. Cov-

*Elimination from returns* of unincorporated banks of *non-taxable securities* is no discrimination against holder of national bank shares.<sup>94</sup>

A bank may enjoin collection of a void tax on shares, though it has not been threatened by stockholders with suit if it pays; it is enough that payment would render it liable to such suit.<sup>95</sup>

In Kansas a statute permits debts owing in good faith by any person, company, or corporation to be deducted from the gross amount of credits belonging to such person, company, or corporation, when listing their property for taxation. The fact that national banks are not allowed to deduct their indebtedness from the value of such shares, is not in conflict with Rev. Sts. § 5219.<sup>95a</sup>

(y) *Mercantile Bank v. New York*,<sup>96</sup> is a very important case on this subject, and because it so clearly expounds the meaning of the term "moneyed capital", and the intent of Congress in limiting the power of State taxation, we give it at some length.

"The main purpose of Congress in fixing limits to State taxation on investments in shares of national banks was to render it impossible for the State in levying such a tax to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business, and operations and investments of like character."<sup>96a</sup>

*ington v. First National Bank*, 198 U. S. 100, 49 L. ed. 963, 25 Sup. Ct. 562 (1905); *Citizens' National Bank v. Kentucky*, 217 U. S. 443, 54 L. ed. 832, 30 Sup. Ct. 532 (1910); *Nevada National Bank v. Dodge*, 119 Fed. 57 (1902).

<sup>95c</sup> *San Francisco National Bank v. Dodge*, 197 U. S. 70, 49 L. ed. 669, 25 Sup. Ct. 384 (1905); *Nevada National Bank v. Dodge*, 119 Fed. 57 (1902).

Assessing shares of stock in a national bank to its stockholders while shares of stock in other banking concerns are assessed to the banks does not amount to discrimination. *Ankeny v. Blakley*, 44 Or. 78, 74 Pac. 485 (1903).

<sup>94</sup> *Exchange National Bank v. Miller*, 19 Fed. 372.

<sup>95</sup> *Albany City National Bank v. Maher*, 19 Blatchf. 175; *Knopf v. First National Bank*, 173 Ill. 331, 50 N. E. 660.

<sup>95a</sup> *Dutton v. National Bank*, 53 Kan. 440, 36 Pac. 719.

<sup>96</sup> 121 U. S. 138, 30 L. ed. 895, 7 Sup. Ct. 286.

<sup>96a</sup> Its object is to prevent hostile discrimination. But a statute which permits interest bearing deposits in a national bank to be taxed does not give such discrimination as to be in conflict with § 5219. *Clement National Bank v. Vermont*, 231 U. S. 120, 58 L. ed. 147, 34 Sup. Ct. 31 (1913); *State v. Clement National Bank*, 84 Vt. 167, 78 Atl. 944, 1912D Ann. Cas. 22, n. .

"The single fact that a State statute regulating the assessment and taxation of shares in national banks permits some debts to be deducted from *some moneyed capital, but not from that which is invested in the shares of national banks*, is not sufficient to show that the amount of moneyed capital from which the debts may be deducted, as compared with the moneyed capital invested in shares of national banks, is so large and substantial as to amount to an illegal discrimination against national bank shareholders, in violation of Rev. Sts. § 5219.<sup>96a</sup>

"Section 5219 of the Rev. Sts. provides that such 'taxation shall not be at a greater rate<sup>96a</sup> than is assessed upon other moneyed capital in the hands of individual citizens of such State.' New York has by its legislation expressly exempted from all taxes in the hands of the individual citizens numerous species of moneyed capital, aggregating in actual value the sum of \$1,686,000,000, whilst it has by its laws subjected national bank shares in the hands of individual holders thereof (aggregating a par value of \$83,000,000), and State bank shares (having a like value of \$22,815,700), to taxation upon their full actual value, less only a proportionate amount of the real estate owned by the bank. This exemption, it is claimed, is of a 'very material part relatively' of the whole, and renders the taxation of national bank shares void.

"The exemptions thus referred to are classified as follows:—

"1st. The shares of stock in the hands of the individual shareholders of all incorporated 'moneyed or stock corporations deriving an income or profit from their capital or otherwise, incorporated by the laws of New York, not including trust companies and life insurance companies, and State or national banks.' The value of such shares, it is admitted, amounts to \$755,018,892.

"2d. Trust companies and life insurance companies. The actual value of the shares of stock in trust companies amounts to \$32,018,900, and the actual value of the shares in life insurance companies amounts to \$3,540,000, which life insurance companies, it is admitted, are the owners of personal property, con-

<sup>96a</sup> First National Bank v. Ayers, 160 U. S. 660, 40 L. ed. 573, 16 Sup. Ct. 412 (1896); West Virginia National Bank v. Dunkle, 65 W. Va. 210, 64 S. E. 531 (1909).

<sup>96a</sup> The word "rate" has relation to assessments as a whole and was not intended to signify the mere percentage of levy upon any valuation that the authorities might see fit to adopt. Ankeny v. Blakley, 44 Or. 78, 74 Pac. 485 (1903).

sisting of mortgages, loans, stocks, and bonds, to the value of \$195,257,305.

"3d. Savings banks and the deposits therein. The deposits amount to \$437,107,501, and an accumulated surplus of \$68,669,001.

"4th. Certain municipal bonds issued by the city of New York under an act passed in 1880, of the value of \$13,467,000.

"5th. Shares of stocks in corporations created by States other than New York, in the hands of individual holders, residents of said State, amounting to \$250,000,000.

"It is argued by the appellant that these exemptions bring the case within the decision of *Boyer v. Boyer*, 113 U. S. 689, 28 L. ed. 1089, 5 Sup. Ct. 706. In that case, referring to the legislation of Pennsylvania, it was said, 'The burden of county taxation imposed by the latter act has, at all events, been removed from all bonds or certificates of loan issued by any railroad company incorporated by the State; from shares of stock in the hands of stockholders of any institution or company in the State which in its corporate capacity is liable to pay a tax into the State treasury under the act of 1859; from mortgages, judgments, and recognizances of every kind; from moneys due or owing upon articles of agreement for the sale of real estate; from all loans, however made, by corporations which are taxable for State purposes when such corporations pay into the State treasury the required tax on such indebtedness.'

"In *Lionberger v. Rouse*, 9 Wall. 468, 19 L. ed. 721, it was held that the proviso originally contained in the act of 1864, and omitted from the act of 1868, expressly referring to State banks, was limited to State banks of issue. The court said (p. 474), '*There was nothing to fear from banks of discount and deposit merely, for in no event could they work any displacement of national bank circulation.*' Of course, so far as investments in such banks are moneyed capital in the hands of individuals, they are included in the clause as it now stands.

"In the case of *Hepburn v. School Directors*, 23 Wall. 480, 23 L. ed. 112, it was decided to be competent for the State to value, for taxation, shares of stock in a national bank at their actual value, even if in excess of their par value, provided thereby they were not taxed at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State. It was a further question in that case whether the exemption from taxation, by statute, of 'all mortgages, judgments, recogni-

zances, and moneys owing upon article of agreement for the sale of real estate', made the taxation of shares in national banks unequal and invalid. This was decided in the negative on the two grounds, 1st, that the exemption was founded upon the just reason of preventing a double burden by the taxation both of property and the debts secured upon it; and 2d, because it was partial only, not operating as a discrimination against investments in national bank shares. The court said, 'It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt.' (p. 485.)

"The rule of decision in *Van Allen v. Assessors*, 3 Wall. 573, 18 L. ed. 229, is not inconsistent with that followed in *People v. Commissioners*, 4 Wall. 244, 18 L. ed. 344. In the former of these cases, the comparison was between taxes levied upon the shares of national banks and taxes levied upon the capital of State banks. In the valuation of the capital of State banks for this taxation, non-taxable securities of the United States were necessarily excluded, while in the valuation of shares of national banks no deduction was permitted on account of the fact that the capital of the national banks was invested in whole or in part in government bonds. The effect of this was, of course, to discriminate to a very important extent in favor of investments in State banks, the shares in which *eo nomine* were not taxed at all, while their taxable capital was diminished by the subtraction of the government securities in which it was invested, and against national bank shares taxed without such deduction at a value necessarily and largely based on the value of the government securities in which by law a large part of the capital of the bank was required to be invested. In the case of *People v. Commissioners*, the comparison was not between the taxation of shareholders in national banks and of shareholders in State banking institutions, but between the taxation of national bank shares and that of personal property held by individuals and insurance companies, from the valuation of which the deduction was permitted of the amount of non-taxable government securities held by them respectively.

"Shares of stock in railroad companies, mining companies, manufacturing companies, and other corporations, are represented by certificates showing that the owner is entitled to an interest, expressed in money value, in the entire capital and

property of the corporation ; but the property of the corporation which constitutes its invested capital may consist mainly of real and personal property, which in the hands of individuals no one would think of calling moneyed capital, and its business may not consist in any kind of dealing in money, or commercial representatives of money.

“ Whether property interest in railroads, in manufacturing enterprises, in mining investments, and others of that description, are taxed or exempt from taxation, in the contemplation of the law, would have no effect upon the success of national banks. There is no reason, therefore, to suppose that Congress intended, in respect to these matters, to interfere with the power and policy of the States. The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue ; in receiving deposits payable on demand ; discounting commercial paper ; making loans of money on collateral security ; buying and selling bills of exchange ; negotiating loans and dealing in negotiable securities issued by the government, State and national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of this statute ‘ moneyed capital.’ Corporations and individuals carrying on these operations do come into competition with the business of national banks, and capital in the hands of individuals thus employed is what is intended to be described by the act of Congress. That the words of the law must be so limited appears from another consideration ; they do not embrace any moneyed capital in the sense just defined, except that in the hands of individual citizens. This excludes moneyed capital in the hands of corporations, although the business of some corporations may be such as to make the shares therein belonging to individuals moneyed capital in their hands, as in the case of banks. A railroad company, a mining company, an insurance company, or any other corporation of that description, may have a large part of its capital invested in securities payable in money, and so may be the owners of moneyed capital ; but, as we have already seen, the shares of stock in such companies held by individuals are not moneyed capital.

“ The terms of the act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises



in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment.

“Trust companies, however, in New York, according to the powers conferred upon them by their charters, and habitually exercised, are not, in any proper sense of the word, banking institutions. They have the following powers: to receive moneys in trust and to accumulate the same at an agreed rate of interest; to accept and execute all trusts of every description committed to them by any person or corporation, or by any court of record; to receive the title to real or personal estate on trusts created in accordance with the laws of the State, and to execute such trusts; to act as agent for corporations in reference to issuing, registering, and transferring certificates of stock and bonds, and other evidences of debt; to accept and execute trusts for married women in respect to their separate property; and to act as guardian for the estates of infants. It is required that their capital shall be invested in bonds and mortgages on unincumbered real estate in the State of New York worth double the amount loaned thereon, or in stocks of the United States, or of the State of New York, or of the incorporated cities of the State.

“It is evident, from this enumeration of powers, that trust companies are not banks in the commercial sense of that word, and do not perform the functions of banks in carrying on the exchanges of commerce.

“In the case of savings banks, we assume that neither the bank itself nor the individual depositor is taxed on account of the deposits. The language of the statute (§4, c. 456, Laws of 1857) is as follows: ‘Deposits in any bank for savings, which are due to the depositors, . . . shall not be liable to taxation, other than the real estate and stocks which may be owned by such bank or company, and which are now liable to taxation under the laws of this State.’ ”

Under the Massachusetts statute the deposits exempt from taxation "denote all the funds received from depositors, and held by the savings bank for investment, including profits and the guaranty fund required by the State law."<sup>96b</sup>

"According to the calculation in this case, the deposits in such bank amount to \$437,107,501, with an accumulated surplus of \$68,669,001. It cannot be denied that these deposits constitute moneyed capital in the hands of individuals within the terms of any definition which can be given to that phrase; but we are equally clear that they are not within the meaning of the act of Congress in such a sense as to require that, if they are exempted from taxation, shares of stock in national banks must thereby also be exempted from taxation. No one can suppose for a moment that savings banks come into any possible competition with national banks of the United States.<sup>96c</sup> They are what their name indicates, banks of deposit for the accumulation of small savings belonging to the industrious and thrifty. To promote their growth and progress is the obvious interest and manifest policy of the State. Their multiplication cannot in any sense injuriously affect any legitimate enterprise in the community. We have already seen, that by previous decisions of this court it has been declared that 'it could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt' (*Hepburn v. School Directors*, 23 Wall. 480, 23 L. ed. 112); and that 'the act of Congress was not intended to curtail the State power on the subject of taxation. It simply required that capital invested in national banks should not be taxed at a greater rate than like property similarly invested. It was not intended to cut off the power to exempt particular kinds of property, if the legislature chose to do so.' *Adams v. Nashville*, 95 U. S. 19, 24 L. ed. 369. The only limitation, upon deliberate reflection, we now think it necessary to add, is that these exceptions should be founded upon just reason, and not operate as an unfriendly discrimination against investments in national bank shares.

"It is further objected, on similar grounds, to the validity of the assessment complained of in this case, that municipal bonds of the city of New York to the amount of \$13,467,000,

<sup>96b</sup> *Suffolk Savings Bank*, Petitioner, 149 Mass. 7, 20 N. E. 331.

<sup>96c</sup> See also *Richards v. Rock Rapids*, 31 Fed. 505.

are also exempted from taxation. The amount of the exemption in this case is comparatively small, looking at the whole amount of personal property and credits which are the subjects of taxation, — not large enough, we think, to make a material difference in the rate assessed upon national bank shares; but, independently of that consideration, we think the exemption is immaterial. Bonds issued by the State of New York, or under its authority by its public municipal bodies, are means for carrying on the work of the government, and are not taxable even by the United States, and it is not a part of the policy of the government which issues them to subject them to taxation for its own purposes. Such securities undoubtedly represent moneyed capital, but as from their nature they are not ordinarily the subjects of taxation, they are not within the reason of the rule established by Congress for the taxation of national bank shares.”

In *First National Bank v. Kreig*, 21 Nev. 404, 32 Pac. 641, it was held that national banks are subject to taxation only upon the shares of stock owned by the shareholders therein, and upon their real estate. Mortgages held by such banks are not subject to taxation.

(2) A State's exemption from taxation to an amount greater than the capital stock of national banks, and of other “moneyed capital” in the hands of individual citizens, will not exempt national bank shares, under U. S. Rev. Sts. § 5219.<sup>97</sup>

McClain's Iowa Statutes, p. 319, providing for the taxing of savings banks by assessing the paid up capital, *held*, not unconstitutionally discriminating against national banks, the shares of which are taxed.<sup>98</sup>

The taxing of savings banks by assessing the paid up capital is valid.<sup>98a</sup>

A savings bank with capital stock may be subject to a franchise tax.<sup>98b</sup>

§§ 242, 243. **Voluntary Liquidation.**<sup>1</sup> — A national bank which has gone into voluntary liquidation<sup>1a</sup> becomes subject to like

<sup>97</sup> Boyer's Appeal, 103 Pa. St. 387.

<sup>98</sup> *National Bank v. Board of Equalization*, 64 Iowa 140, 19 N. W. 889.

<sup>98a</sup> *Davenport Bank v. Board of Equalization*, 123 U. S. 83, 31 L. ed. 94, 8 Sup. Ct. 73 (1887).

<sup>98b</sup> *Fidelity Savings Bank v. State*, 103 Md. 206, 63 Atl. 484 (1906); *State v. German Savings Bank*, 103 Md. 196, 63 Atl. 481 (1906).

<sup>1</sup> §§ 242, 243. R. S. 5220. §§ 42, 43.

<sup>1a</sup> A national bank may go into liquidation even though it is solvent, *Green v. Bennett*, 110 S. W. 108 (Tex. Civ. App.) (1908), and it is con-

proceedings as domestic corporations; for instance, to a creditor's bill to reach a fund held by the president.<sup>2</sup>

A national bank, the successor of one which went into liquidation, is liable for deposits therein.<sup>3</sup>

A bank resolved to liquidate, suspended business, deposited with the Treasurer money to redeem its circulation, and received its bonds by re-assignment. There was no actual or formal surrender of its franchises, nor any judicial dissolution, and it was *held*, that the corporation was not dissolved.<sup>4</sup>

A national bank cannot be proceeded against under the Bankrupt Act. That act does not repeal or supersede the National Banking Law, and its provisions as to winding up national banks, which are exclusive. It would produce great confusion to hold that both acts apply to national banks.<sup>5</sup>

A national bank which has gone into voluntary liquidation under U. S. Rev. Sts. 5220, is not thereby dissolved, but may sue and be sued by name for the purpose of winding up its business.<sup>6</sup> It continues for the purpose of *liquidation and winding up its business*, but the stock of a bank in liquidation, either voluntary or involuntary, may not be the subject of traffic and transfer from one to another upon the books of the corporation after it has ceased to do business in the usual way.<sup>7</sup>

A national bank has the right to wind up its business and consolidate with another national bank,<sup>8</sup> and this right must be considered as read into and forming a part of the charter of every

trary to the wishes and contrary to the interests of the minority stockholders. *Green v. Bennett, supra*. But when the directors and executive officers, who own two thirds of the stock, vote to liquidate the bank they must make such disposition of the assets as will be to the best interest of all the stockholders, including minority dissenting stockholders. *Green v. Bennett, supra*.

<sup>2</sup> *Merchants & Planters' National Bank v. Trustees of Masonic Hall*, 65 Ga. 603.

<sup>3</sup> *Eans v. Exchange Bank of Jefferson City*, 79 Mo. 182.

<sup>4</sup> *Ordway v. Central National Bank of Baltimore*, 47 Md. 217.

<sup>5</sup> *In re Manufacturers' National Bank*, 5 Biss. 499.

<sup>6</sup> *Farmers' National Bank v. Suther*, 28 Okla. 806, 116 Pac. 173 (1911); *George v. Wallace*, 135 Fed. 286 (1904), affirmed in 201 U. S. 230, 50 L. ed. 738, 26 Sup. Ct. 495. See also *First National Bank v. Pennig*, 28 Cal. App. 267, 151 Pac. 1153 (1915); *Cogswell v. Second National Bank*, 76 Conn. 252, 56 Atl. 574 (1903); *Tuttle v. Iron National Bank*, 170 N. Y. 9, 62 N. E. 761 (1902).

<sup>7</sup> *Muir v. Citizens' National Bank*, 39 Wash. 57, 80 Pac. 1007 (1905).

<sup>8</sup> *Bonnet v. First National Bank*, 24 Tex. Civ. App. 613, 60 S. W. 325 (1900).

national bank. The effect of the consolidation is the formation of a new corporation whose stockholders are those of the consolidating corporation; and a shareholder of the previous bank has no right to new shares bought in with the increase of its capital stock.<sup>8</sup>

A liquidating agent or committee may be authorized to settle the affairs of a national bank;<sup>9</sup> he may have power to pay its debts by the delivery of assets,<sup>10</sup> but he has no authority to create a new and different liability on the part of the bank or its stockholders.<sup>10</sup> And if one assumes the liability of the bank on its voluntary liquidation one is liable on a breach of warranty occurring after one assumes the liability.<sup>11</sup> But when the liquidators are instructed by the stockholders to sell the assets they are not liable for so doing.<sup>12</sup>

§ 244. **Change of a Pre-existing Corporation into a National Bank.**<sup>1</sup> — (a) A bank established under State laws, and reorganizing under the act of Congress as a national banking association, does not thereby lose any of the assets or escape any of the liabilities appertaining to it in its former character.<sup>1a</sup> It is not divested of its identity by a change which is a “transition and not a new creation.” Therefore, where a special deposit has been made with the State institution, the national association will be under the same liability as was its predecessor to return it or to make good its value in damages.<sup>2</sup> And where the State bank had offered a reward, the national bank was held to payment thereof.<sup>3</sup>

(b) A guarantor was bound upon a continuing guaranty running to a State bank, which reorganized as a national bank. *Held*, that the national bank might enforce the liability.<sup>4</sup>

(c) A national bank, organized as successor to a State bank, may foreclose a mortgage on real estate, which was given as security for a note held by the State bank, both note and mort-

<sup>9</sup> *Green v. Bennett*, 110 S. W. 108 (Tex. Civ. App.) (1908).

<sup>10</sup> *First National Bank v. Armstrong*, 168 S. W. 873 (Tex. Civ. App.) (1914).

<sup>11</sup> *McLean v. Moore*, 145 S. W. 1074 (Tex. Civ. App.) (1912).

<sup>12</sup> *In re Shreveport National Bank*, 118 La. 664, 43 So. 270 (1907).

<sup>1</sup> § 244. R. S. 5154, 5155. §§ 44, 65. See Fed. Res. Act, § 8.

<sup>1a</sup> *Metropolitan Bank v. Claggett*, 141 U. S. 520, 35 L. ed. 841, 12 Sup. Ct. 60.

<sup>2</sup> *Coffey v. National Bank of the State of Missouri*, 46 Mo. 140.

<sup>3</sup> *Kelsey v. National Bank of Crawford*, 69 Pa. St. 426; and see *Maynard v. Bank*, 1 Brewster (Pa.) 483.

<sup>4</sup> *City National Bank of Poughkeepsie v. Phelps*, 86 N. Y. 484 (1881).

gage having been assigned, among the assets of the State bank, to the national bank.<sup>5</sup>

(d) A *national bank* in fact organized as the *successor* of a *State bank* may hold the assets of its predecessor, even though in form it was organized as a new bank.<sup>6</sup>

(e) A State bank paid its president money, which he falsely said he had paid its creditor. It became a national bank; the creditor recovered from the national bank. *Held*, that it could recover from the president the money had and received, although the State statute provided that the State bank should be continued for three years, to close its concerns.<sup>7</sup>

(f) One who at the time of the reorganization is a debtor of the State association, and also a holder of its bills, can compel the national bank, although insolvent, to receive these bills in payment of the debt. But *aliter*, where the debt ran originally to the national association, and was put in judgment, and the bills of the State bank were subsequently obtained by the debtor.<sup>8</sup>

(g) A testator owning stock in a State bank bequeathed it with the proviso that, if during the life of the legatee "the whole or any part of said stock shall be paid off and refunded, by the expiration of the charter, or from any cause whatsoever, then the amount so paid off and refunded shall be paid to", etc. The State bank afterwards became a national bank, and it was held, in a proceeding to test the title to the shares, that the conversion of the State bank into a national bank was not a paying off and refunding of the stock of the former.<sup>9</sup>

(h) Under the United States statute and the statutes of Massachusetts, a national banking association succeeds to the rights of action of its predecessor, the State corporation, and may bring suit thereon in its own name.<sup>10</sup>

(i) The Grocers' Bank, established under State law, re-organized as the Grocers' National Bank, under the act of Congress. When the Grocers' Bank ceased to exist, it had a right of action against

<sup>5</sup> Scofield v. State National Bank of Lincoln, 9 Neb. 316, 2 N. W. 888, citing National Bank v. Matthews, 98 U. S. 621, 25 L. ed. 188.

<sup>6</sup> Western Reserve Bank v. McIntire, 40 Ohio St. 528. See People's National Bank v. Kingfisher County, 24 Okla. 145, 104 Pac. 55 (1909), affirming 103 Pac. 682.

<sup>7</sup> Atlantic National Bank v. Harris, 118 Mass. 147.

<sup>8</sup> Thorp v. Wegefarrth, 56 Pa. St. 82.

<sup>9</sup> Maynard v. Bank, 1 Brewster (Pa.) 483; and see Kelsey v. National Bank of Crawford, 69 Pa. St. 426.

<sup>10</sup> Atlantic National Bank v. Harris, 118 Mass. 147.

an officer for fraudulent misapplication of its assets. *Held*, that this right of action was a part of the assets of the State association, and, as such, passed to the national association, and might be prosecuted by it.<sup>11</sup>

(j) Where a State enactment made subsequent to the National Banking Act authorizes a State bank to reorganize as a national bank, but under the condition that it shall continue to pay a certain bonus to the State, in accordance with a stipulation imposed by its State charter, such tax cannot afterward be recovered from the national association, on the ground of an implied contract. The State has no power thus to intermeddle, and subject the new association to a burden of this character.<sup>12</sup>

(k) The bank does not have to get the consent of the State to such a change. Congress was as competent to authorize such a transformation as to create anew.<sup>13</sup>

The personal property of the old bank passes to the new, on execution of the papers necessary to the change from a State to a national bank, and approval by the proper officer. No other assignment is necessary.<sup>14</sup>

The new bank may, under a State statute, bring suit in the old name, upon a judgment obtained in that name.<sup>15</sup>

A note taken by the new bank from the old, among the discounted notes, is not itself, nor is any renewal of it, within the meaning of § 5200, as given for money borrowed of a national bank.<sup>16</sup>

§ 245. **Deposits by the United States.**<sup>1</sup> — Where public moneys are deposited in a national bank, the same relation exists between the bank and the United States as would exist between the bank and a depositor of private moneys. The bank does not become by such deposit an agent of the United States so as to render the Government liable for the money deposited in case of the failure of the bank.<sup>2</sup>

<sup>11</sup> *Grocers' National Bank v. Clark*, 48 Barb. (N. Y.) 26.

<sup>12</sup> *State v. National Bank of Baltimore*, 33 Md. 75.

<sup>13</sup> *Casey v. Galli*, 94 U. S. 673, 24 L. ed. 168.

And a shareholder is not permitted to deny the existence or validity of such a corporation or his responsibility as a shareholder thereof. *Aldrich v. Bingham*, 131 Fed. 363 (1904).

<sup>14</sup> *Watriss v. First National Bank of Cambridge*, 124 Mass. 571.

<sup>15</sup> *Thomas v. Farmers' National Bank*, 46 Md. 43.

<sup>16</sup> *Allen v. First National Bank of Xenia*, 23 Ohio St. 97.

<sup>1</sup> § 245. R. S. 5153. § 45.

<sup>2</sup> *Branch v. The United States*, 12 Bank. Mag. 61; *Thompson's National Bank Cas.* 363.

All national banking associations designated for that purpose by the Secretary of the Treasury shall be depositaries of public money, except receipts from customs, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public moneys and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government. And every association so designated as receiver or depository of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks.<sup>3</sup>

§§ 246-252. **General Provisions as to Insolvent Banks.**<sup>1</sup> — The provisions contained in the National Banking Act for the winding up of an insolvent bank have been held not to be superseded by the subsequent passage of the Bankrupt Act, but to remain in full and exclusive force; so that the national banks cannot either be thrown into bankruptcy involuntarily, or avail themselves of it voluntarily. The Federal courts have no power to declare such banks to be bankrupt.<sup>2</sup>

Where those circumstances exist which the act of Congress makes necessary for authorizing the Comptroller of the Currency to declare a bank insolvent, and proceed to wind it up, the provisions of the act must of course be followed. But in the absence of those contingencies which the act enumerates as giving such authority to the Comptroller in respect of the affairs of an insolvent bank, it appears that any court, otherwise of competent jurisdiction, is not prevented by the statute

<sup>3</sup> 3 June, 1864, c. 106, § 45.

Under U. S. Rev. Sts., § 5153, and the regulations of the Secretary of the Treasury in Circulars 49 and 102, checks drawn by the federal disbursing agent of the Government on a Government depository payable to a fictitious payee with the knowledge of such agent as drawer cannot be considered valid checks payable to bearer, and the bank is chargeable with notice of the limitations of authority of the agent drawer. *United States v. National Bank of Commerce*, 205 Fed. 433 (1913).

<sup>1</sup> §§ 246-252. R. S. 5226-5238, 5242. §§ 46-52.

<sup>2</sup> *In re Manufacturers' National Bank*, 5 Biss. 499.



from acting in the ordinary manner, as in the case of any other insolvent corporation. It may, upon a bill in equity properly framed, appoint a receiver, and invest him with the customary functions of the office.<sup>3</sup> Also it has been said, more generally, that, when the Comptroller has taken no steps towards appointing a receiver, a court of equity is not barred by the statute from making such appointment at the instance of a judgment creditor.<sup>4</sup>

A creditor of an insolvent national bank cannot sue the receiver, since the only duty of that officer is to turn over the assets to the Comptroller of the Currency. The Comptroller may be reached by proceedings seeking a proper distribution of the fund in his hands; but an action of assumpsit will not lie against him. In this latter form, the suit must be brought against the bank, which is continued in existence for the purpose of being sued.<sup>5</sup>

The meaning of the word "insolvency" in the fifty-second section of the act of 1864 is the same as in the Bankrupt Act, and means a present inability to pay in the ordinary course of business.<sup>6</sup>

Under section 50 of the National Banking Act, which authorizes receivers to compromise doubtful debts "on the order of a court of record of competent jurisdiction", a District Court of the United States is within the requirements of the statute, and may make an order of compromise.<sup>7</sup>

A bill brought by the assignee of bonds deposited by a national bank with the Treasurer of the United States, in order to procure circulating notes, cannot be maintained where the receiver of such bank is made a party defendant to the bill, and it is prayed that his appointment be decreed null and void, unless it is clearly shown by the complaint that the receiver has an interest in the subject matter of the bonds, and is acting in derogation of the plaintiff's rights.<sup>8</sup>

<sup>3</sup> *Irons v. Manufacturers' National Bank*, 6 Biss. 301; *Grout v. First National Bank*, 48 Colo. 577, 111 Pac. 556 (1910). (The bank was not insolvent but had ceased to be a going concern.)

<sup>4</sup> *Wright v. Merchants' National Bank*, 3 Cent. Law Jour. 351; *Thompson's National Bank Cas.* 321.

<sup>5</sup> *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383, 20 L. ed. 840; *Chemical National Bank v. Bailey*, 12 Blatchf. 480; see *post*, § 250 *a*, "Suits against a Receiver."

<sup>6</sup> *Case v. Citizens' Bank of Louisiana*, 2 Woods 23.

<sup>7</sup> *Petition of Platt*, 1 Bened. 534.

<sup>8</sup> *Van Antwerp v. Hulburd*, 8 Blatchf. 282; and see *Same v. Same*, 7 Blatchf. C. C. 426.

Moreover, if the plaintiff and receiver are citizens of the same State, the title to the bank's residuary interest in the bonds is not a question within the jurisdiction of a United States Circuit Court.<sup>9</sup>

A creditor of an insolvent national bank, who establishes his debt by suit and judgment after the Comptroller's refusal to allow it, is entitled to share in dividends upon the debt and interest so established, as of the day of the failure of the bank; and not upon the basis of the judgment, if it includes interest after that date.<sup>10</sup>

A return of *nulla bona* upon an execution against a bank is ample evidence of its insolvency.<sup>11</sup>

The legal existence of a corporation is not cut short by its insolvency and the consequent appointment of a receiver; and there is nothing in the statutes relating to national banks which takes them out of the operation of this general rule.

After passing into the hands of a receiver, a national bank remains liable, during the remainder of its lease, for accrued and accruing rent, unless the lessor relets the premises before the end of the term, in which case the liability extends to the date of reletting and for any diminution in the rent for the remainder of the term after reletting.<sup>12</sup>

§ 250 A. **Appointment of Receiver, etc.** — For causes of action other than those which are by Act of Congress made the foundation for winding up proceedings, a state court may, at the instance of a stockholder who is also a *cestui que* trust, appoint a receiver to wind up a national bank,<sup>0</sup> and such a receiver may enforce the liabilities of shareholders.<sup>0a</sup>

The appointment of a receiver does not dissolve the bank, and the bank and receiver can both be made defendants.<sup>1</sup>

<sup>9</sup> Hall, J., 8 Blatchf. 282.

<sup>10</sup> White v. Knox, 111 U. S. 784, 28 L. ed. 603, 4 Sup. Ct. 686.

<sup>11</sup> Wheelock v. Kost, 77 Ill. 296; Chemical Bank v. Hartford Deposit Co., 161 U. S. 1, 40 L. ed. 595, 16 Sup. Ct. 439 (1896).

<sup>12</sup> Chemical Bank v. Hartford Deposit Co., 161 U. S. 1, 40 L. ed. 595, 16 Sup. Ct. 439 (1896).

<sup>0</sup> § 250 A. Cogswell v. Second National Bank, 76 Conn. 252, 56 Atl. 574 (1903). See also Grout v. First National Bank, 48 Colo. 557, 111 Pac. 556 (1910).

<sup>0a</sup> King v. Pomeroy, 121 Fed. 287 (1903).

<sup>1</sup> Green v. Walkill National Bank, 7 Hun (N. Y.) 63; Moss v. Goodhart, 209 Fed. 102 (1913); Ryan v. Mt. Vernon National Bank, 206 Fed. 452 (1913); Camp v. First National Bank, 44 Fla. 497; 33 So. 241, 103 Am. St. Rep. 173 (1902). The bank also has the capacity to sue. Moss

The appointment of a receiver by the Comptroller is conclusive, and not subject to review.<sup>1a</sup>

As soon as appointed, the bank and all its assets, books, and papers pass into his hands, and neither directors nor other officers have any rights in the premises.<sup>2</sup>

When a receiver, on taking possession of the assets of a national bank, finds its affairs in confusion and stock pledged to it as collateral with no definite and certain agreement as to the particulars of the pledge, it is his duty to ascertain and assert fully the obligations and liabilities of the pledgor to the bank and the purpose and extent of the pledge.<sup>2a</sup>

The receiver is the one to be sued to recover the value of special deposits lost by the bank before its failure.<sup>3</sup>

So a suit for damages by misconduct of officers before failure may be brought against the receiver as sole defendant.<sup>4</sup>

The receiver may buy real estate through a trustee to save a debt due the bank.<sup>5</sup>

The receiver may sell and transfer a claim against a stockholder, as there is no personal trust imposed upon him to collect the same.<sup>5a</sup>

The Statute of Limitations begins to run when the receiver is appointed; and if the Comptroller's order of assessment is more than six years after such appointment, the claim is barred.<sup>6</sup>

The receiver has no greater rights in enforcing the collection of the bank's assets than the bank itself.<sup>7</sup>

"Under the direction of the Comptroller", means that the receiver is subject to orders; but he may act in the absence of orders; it is his duty to collect the assets.<sup>8</sup>

*v. Goodhart, supra; Camp v. First National Bank, supra. See also Tecumseh National Bank v. Chamberlain Banking House, 63 Neb. 163, 88 N. W. 186, 57 L. R. A. 811 (1901).*

<sup>1a</sup> *Boyd v. Schneider, 124 Fed. 239 (1903).*

The receiver is subject to removal by the comptroller. *Boyd v. Schneider supra.*

<sup>2</sup> *Bank of Bethel v. Pahquioque Bank, 14 Wall. 383, 20 L. ed. 840.*

<sup>2a</sup> *Wise v. Williams, 162 Fed. 161 (1908).*

<sup>3</sup> *Turner v. First National Bank of Keokuk, 26 Iowa 562.*

<sup>4</sup> *Case v. Bank, 100 U. S. 446, 25 L. ed. 695.*

<sup>5</sup> *Zantzingers v. Gunton, 19 Wall. 32, 22 L. ed. 96.*

<sup>5a</sup> *Waldron v. Alling, 73 App. Div. 86 (1902), 76 N. Y. S. 250.*

<sup>6</sup> *Price v. Yates, 19 Alb. Law Jour. 295.*

<sup>7</sup> *Casey v. Credit Mobilier, 2 Woods 77. See Brown v. Schleier, 118 Fed. 981 (1902); Hallett v. Fish, 132 Fed. 201 (1913); Skud v. Tillinghast, 195 Fed. 1 (1912).*

<sup>8</sup> *Bank v. Kennedy, 17 Wall. 22, 21 L. ed. 556.*

The receiver represents, not the Government,<sup>8a</sup> but the bank, stockholders, and creditors,<sup>8a</sup> and he cannot subject the Government to the jurisdiction of the courts by answering for it.<sup>9</sup>

The assets of a national bank are not brought under the control and protection of the Federal courts, by being taken into custody by a receiver appointed by the Comptroller.<sup>9a</sup>

The decision of a receiver on a claim is not final; the creditor may after his disallowance sue the bank.<sup>10</sup>

A receiver is an officer of the United States, and as such may sue at common law in the District Courts.<sup>11</sup>

The receiver may apply to the District Court where the bank is located for authority to compromise a doubtful debt,<sup>12</sup> and he may even abandon an unfounded claim.<sup>13</sup>

§ 250. (a) **Suits by a Receiver.**<sup>1</sup>—The receiver may bring a suit to recover an ordinary debt <sup>1a</sup> of the bank, without being directed so to do by the Comptroller of the Currency. For his very appointment makes it his duty to collect the assets and debts of the association; neither in such an instance is any unusual ex-

<sup>8a</sup> *Brown v. Schleier*, 118 Fed. 981 (1902); *id.*, 112 Fed. 577. See *King v. Pomeroy*, 121 Fed. 287 (1903).

<sup>9</sup> *Case v. Terrell*, 11 Wall. 199, 20 L. ed. 134. He is not empowered with all the visitatorial powers over a national bank which the United States acting in its sovereign capacity may exercise. *Brown v. Schleier*, 118 Fed. 981 (1902).

<sup>9a</sup> *Snohomish Co. v. Puget Sound National Bank*, 81 Fed. 518 (1897). See also *Boyd v. Schneider*, 124 Fed. 239 (1903).

<sup>10</sup> *Pahquioque Bank v. Bethel Bank*, 36 Conn. 325.

<sup>11</sup> *Platt v. Beach*, 2 Ben. 303; *Gibson v. Peters*, 150 U. S. 342, 37 L. ed. 1104, 14 Sup. Ct. 134 (1893); *Auten v. United States National Bank*, 174 U. S. 125, 43 L. ed. 920, 19 Sup. Ct. 628 (1899); *McCartney v. Earle*, 115 Fed. 462 (1902). And the citizenship of the receiver is immaterial. *Weeks v. International Trust Co.*, 125 Fed. 370 (1903).

<sup>12</sup> *Matter of Platt*, 1 Ben. 534; *Boyd v. Schneider*, 124 Fed. 239 (1903).

But a receiver cannot compromise a claim without the consent of all the interested parties to the suit or upon order of the court after it has acquired jurisdiction of the claim in a suit to which he is a party. *Empire State Surety Co. v. Carroll County*, 194 Fed. 593 (1912).

He may be authorized to compromise claims or he may be ordered by the court to do so to avoid long and expensive litigation. *McGregor v. Third National Bank*, 124 La. 557, 53 S. E. 93 (1905); *Lamer v. Taylor*, 141 Ga. 227, 80 S. E. 1085 (1913).

<sup>13</sup> *Wise v. Williams*, 162 Fed. 161 (1908).

<sup>1</sup> § 250. R. S. 5234. § 50.

<sup>1a</sup> No debt becomes due the receiver as such until a deficiency has been ascertained and an assessment made. *McDonald v. Thompson*, 184 U. S. 71, 46 L. ed. 437, 22 Sup. Ct. 297 (1902).

ercise of judgment required.<sup>2</sup> But he cannot institute suits against the shareholders for the purpose of enforcing their personal liability to contribution, unless he shall have been first instructed so to do by the Comptroller.<sup>2a</sup> For he has not knowledge of the facts requisite to enable him to form a proper judgment concerning the necessity for, or the propriety of, such action; neither is it intended that this question should depend upon the discretion of any other or lower officer than the Comptroller.<sup>3</sup>

A receiver appointed under the currency act to wind up the affairs of an insolvent national bank is an officer of the United States, and is therefore competent to maintain a suit in any District or Circuit Court of the United States.<sup>4</sup>

A receiver may doubtless challenge any wrongful acts which creditors could challenge, and may maintain such suits against third parties including actions against the directors and stockholders of the bank on account of wrongful and fraudulent acts, as the corporation might maintain. But a receiver of a national bank is not, by virtue of his office, authorized to impeach an executed transaction between the bank and a third party, that was simply *ultra vires* and to which no objection was made by the United States or by a stockholder, and to ask that the property of a lessor be charged with a lien for unauthorized expenditures of the bank.<sup>4a</sup>

The receiver may bring suits either in his own name, as receiver, or in the name of the insolvent association.<sup>5</sup>

<sup>2</sup> *Bank v. Kennedy*, 17 Wall. 19, 21 L. ed. 554. The receiver may ordinarily act without special instructions. *Moss v. Goodhart*, 209 Fed. 102 (1913).

If an instrument assigns certain shares of stocks and bonds to a receiver to secure a debt and vests the receiver with "the rights of an owner, so far as regards sale, disposition and management", his dealings with the stocks and bonds, after the death of the assignor, with the approval of the comptroller, by which a forced sale is prevented and all interested parties are benefited cannot be attacked in equity by the assignor's administrator because he did not assent to the same. *McCartney v. Earle*, 115 Fed. 462 (1902).

<sup>2a</sup> But the authority to bring action is no way curtailed or withdrawn by a subsequent authority to compromise or sell the cause of action. *McClaine v. Rankin*, 119 Fed. 110 (1902).

<sup>3</sup> *Ibid.*; *Kennedy v. Gibson*, 8 Wall. 498, 19 L. ed. 476.

<sup>4</sup> *Platt v. Beach*, 2 Ben. 303.

<sup>4a</sup> *Brown v. Schleier*, 118 Fed. 981 (1902); *id.*, 112 Fed. 577 (1901), affirmed in 194 U. S. 18, 48 L. ed. 857, 24 Sup. Ct. 558. See also *Freeman v. Jackson*, 227 Fed. 688 (1915), holding that the suit is also cognizable in equity.

<sup>5</sup> *Kennedy v. Gibson*, 8 Wall. 498, 19 L. ed. 476; *Bank v. Kennedy*,

The debtors of a bank, when sued by a receiver, cannot inquire into the legality of his appointment. It is sufficient for the purposes of such a suit that he has been appointed and is receiver in fact, the action of the Comptroller in making the appointment being conclusive as to all debtors.<sup>6</sup> The bank, however, may move to set aside the appointment, and of course, if the motion be successful, the debtors may thereafter take advantage of this result.<sup>7</sup>

The power conferred on a national bank receiver by the act of Congress of 1864, "to collect all debts due such bank", imports power to adopt the necessary means to attain the object, including authority to sue and stand in judgment in the courts of the country in all cases involving such collection.<sup>8</sup>

The receiver may bring suit at law or in equity, and he may sue in his own name or in the name of the bank, although the act does not in terms give him authority to sue in his own name.<sup>9</sup> Pending a bill filed to enforce the liability of the shareholders of a national bank, a receiver appointed by the Comptroller cannot maintain a suit at law to enforce the liability of an individual shareholder.<sup>10</sup>

A receiver may sue in law for the conversion of notes which have been transferred by a bank in contemplation of insolvency.<sup>10a</sup>

A receiver who comes into a State to enforce a mortgage executed to him to secure a preexisting indebtedness to the bank is subject to the laws of the State relating to mortgages issued in fraud of creditors.<sup>10b</sup>

17 *id.*, 19, 21 L. ed. 554; *Casey v. Galli*, 94 U. S. 673, 24 L. ed. 168; *Ball v. German Bank*, 187 Fed. 750 (1911); *McCartney v. Earle*, 115 Fed. 462 (1902); *Fish v. Olin*, 76 Vt. 120, 56 Atl. 533 (1903); *Boyd v. Schneider*, 124 Fed. 239 (1903); *Campbell v. Manufacturers' National Bank*, 67 N. J. L. 301, 51 Atl. 497, 91 Am. St. Rep. 438 (1902); *Allen v. Luke*, 141 Fed. 694 (1906).

The receiver has the legal title to the assets of a bank and may sue in his own name in the state court. *Fish v. Olin*, 76 Vt. 120, 56 Atl. 533 (1903).

<sup>6</sup> *Cadle v. Baker*, 20 Wall. 650, 22 L. ed. 448; *Platt v. Beebe*, 57 N. Y. 339; *Jacobson v. Berry*, 135 Ill. App. 415 (1907).

<sup>7</sup> *Cadle v. Baker*, 20 Wall. 650, 22 L. ed. 448.

<sup>8</sup> *Case v. Berwin*, 22 La. Ann. 321.

<sup>9</sup> *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383, 20 L. ed. 840. See also *Lafayette Trust Co. v. Higginbotham*, 136 App. Div. 749 (1910), 121 N. Y. S. 489.

<sup>10</sup> *Harvey v. Lord*, 11 Biss. 144.

<sup>10a</sup> *Ball v. German Bank*, 187 Fed. 750 (1911).

<sup>10b</sup> *Watts v. Dubois*, 66 S. W. 698 (Tex. Civ. App.) (1902).

The claim of the receiver may be subject to recoupment.<sup>10c</sup>

(b) **Suits against a Receiver.**<sup>11</sup> — An extraordinary attempt was made in the Circuit Court in Louisiana to bring the United States into the suit as a defendant, not indeed by name, but for all practical purposes. A bill in equity made the receiver of the insolvent bank and the Comptroller of the Currency of the United States parties defendant, and prayed that a certain admitted debt due to the bank from the United States be ascertained; that the United States be charged with and required to account for certain sums; and that the Comptroller should be enjoined from making a dividend until the account should have been adjusted. The lower court actually rendered a decree against the United States for a certain sum, and directed that no claim of the United States should have any preference in the distribution of the corporate assets except as to the bonds pledged to secure circulation. The Supreme Court of the United States, in setting aside this decree, remarked that the receiver “represents the bank, its stockholders and its creditors, and does not in any sense represent the Government; also that no such authority can be conceded to the Comptroller; that it may well admit of doubt, whether in the exercise of duties specially confided to him by acts of Congress, he can submit himself to the control of the courts, especially of those which can assert no such jurisdiction by reason of their territorial limits; but that, without discussing how far he may thus submit to the courts, and consent to be governed in his official action by their decrees, so far as these affect parties impleaded in the same suit, it is certain that he cannot subject the United States to such jurisdiction, nor submit the rights of the government to litigation in any court.”<sup>12</sup>

Even after the appointment of a receiver the bank itself continues to exist, and a suit may be instituted against it in its corporate name and character.<sup>13</sup>

<sup>10c</sup> *Skud v. Tillinghast*, 195 Fed. 1 (1912).

<sup>11</sup> R. S. 5234. § 50.

<sup>12</sup> *Case v. Terrell*, 11 Wall. 199, 20 L. ed 134.

<sup>13</sup> *Security Bank of New York v. National Bank of the Commonwealth*, 4 Thomp. & C. (N. Y.) 518; *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383, 20 L. ed. 840; *Chemical National Bank v. Bailey*, 12 Blatchf. 480; *Green v. Walkill National Bank*, 7 Hun (N. Y.) 63; *Tecumseh National Bank v. Chamberlain Banking House*, 63 Neb. 163, 88 N. W. 186, 57 L. R. A. 811 (1901); *Moss v. Goodhart*, 209 Fed. 102 (1913).

The receiver cannot be compelled to pay the costs of a suit against his bank, which was put into judgment before his appointment; because he is not a party to the record, is not an officer of the court, and is bound to pay all the money he receives into the United States treasury.<sup>14</sup>

As soon as a receiver is appointed, it is his duty to interpose in pending suits,<sup>14a</sup> and take any steps necessary to remove existing liens. He may claim the property of the bank as against an attachment issued after the bank became insolvent, although prior to his appointment.<sup>15</sup>

Suit cannot be brought against the receiver in the United States courts by a party residing in the same district with him.<sup>16</sup>

Under the U. S. Rev. Sts. § 5234, a stockholder cannot maintain an action against the directors and receiver of a national bank for misconduct, etc., until the Comptroller of the Currency has refused to direct the receiver to sue; and the complaint must allege a demand upon the Comptroller accordingly.<sup>17</sup>

*It seems* that an improper refusal by the Comptroller would authorize the stockholders to sue in a State court, making the corporation or its representative a defendant.<sup>17</sup>

When a promissory note contains a provision that if it is not paid at maturity the makers and endorsers shall be liable for all costs of collecting or attempting to collect the same, including an attorney's fee, it cannot be enforced beyond the allowance of statutory costs against the receiver of an insolvent national bank who took charge of its assets for the purpose of liquidation before the note matured.<sup>17a</sup>

(c) **Distribution of Assets of Insolvent Bank.**<sup>18</sup> — The provisions of the act concerning the distribution of the assets of an insolvent bank are said clearly to manifest a design on the part of Congress, 1st, to secure the government for the payment

<sup>14</sup> *Ocean National Bank v. Carll*, 7 Hun (N. Y.) 237.

<sup>14a</sup> See *United States v. Young*, 128 Fed. 111 (1904).

<sup>15</sup> *National Bank v. Colby*, 21 Wall. 609, 22 L. ed. 687.

<sup>16</sup> *Van Antwerp v. Hulburd*, 8 Blatchf. 282.

<sup>17</sup> *Brinckerhoff v. Bostwick*, 23 Hun 237.

The complaint by a stockholder must allege demand upon the receiver's successor, the Comptroller and the bank and a refusal by each to institute suit before an action may be brought against the receiver for wrongfully, wilfully, and negligently selling assets of the bank for less than fifty per cent of their face value. *Moss v. Goodhart*, 209 Fed. 102 (1913).

<sup>17a</sup> *Citizens' Bank etc. Co. v. Thornton*, 174 Fed. 752 (1909).

<sup>18</sup> R. S. 5236. § 50.



of the circulating notes of the bank, not only by requiring in advance of the issue of such notes a deposit of the bonds of the United States, but further by giving to the government a first lien for any deficiency that may arise on all the assets subsequently acquired by the insolvent bank; and, 2d, to secure the residue of the assets of the bank for ratable distribution among its general creditors. This lien of the government continues to exist until the United States has been fully reimbursed for all sums paid out by it for the redemption of the notes of the bank, and it cannot be defeated by any proceedings in the nature of an attachment on the part of any other creditor. Neither can any such attachment operate to give the attaching creditor any preference over other private creditors, since the acquisition of such preference would defeat the intended ratable distribution among all creditors alike. Any suit which has been begun against the bank abates by virtue of the decree forfeiting the rights, privileges, and franchises of the association. Any attachment made in any such suit becomes at the same time necessarily altogether ineffectual and void. By the forfeiture the corporation is necessarily dissolved. Its existence as a legal entity is thereupon ended; it is a defunct institution, against which judgment can no more be rendered in a suit previously begun than judgment could be rendered against a dead man who has died *pendente lite*.<sup>19</sup>

Under the currency act the United States has a first and permanent lien upon all the assets of a national bank to the amount expended in paying the circulating notes of such association, and therefore the rights of an ordinary attaching creditor will be postponed to this paramount privilege.<sup>20</sup>

Section 50 of the National Banking Act requires the Comptroller of the Currency to apply the moneys paid over to him by the receiver of an insolvent bank "on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction." It has been held that, under this section, claims which have been proved to the satisfaction of the Comptroller are equivalent in all respects to claims which have been put in judgment. Accordingly, a depositor who has demanded payment of his deposit and has been refused is entitled to claim, not only the principal of the deposit, but interest thereon

<sup>19</sup> *National Bank v. Colby*, 21 Wall. 609, 22 L. ed. 687.

<sup>20</sup> *Schmidt v. The First National Bank of Selma*, 22 La. Ann. 314.

from the time of the demand.<sup>21</sup> In the cited case, the principal was paid in full, but by instalments, and the demand for interest was refused, on the supposition on the part of the Treasurer that the creditor was not entitled to it. But the court having, as already stated, ruled otherwise, it was further held that the plaintiff was entitled to interest, to be reckoned from the date of payment of the last instalment upon the aggregate amount of interest which ought then to have been paid to him.

If the depositor makes no demand for payment, interest will be calculated and allowed from the date when the Comptroller declares the bank in default and appoints a receiver.<sup>22</sup>

In another case of like purport, Wallace, J. held that creditors were entitled to receive interest on their demands during the period of the receiver's administration of the affairs of the insolvent bank, before any surplus in his hands could become properly distributable to shareholders. "The equity," he said, "of the creditors to receive interest on their claims for the time during which they have been precluded from receiving their principal, is obvious."<sup>23</sup>

It was decided by Cole, J., that, under section 50 of the Currency Act the assets of a national bank, "in the hands of the receiver, or when reduced to money and placed subject to the order of the Comptroller, are to be ratably divided and appropriated to the payment of all legal liabilities of the association, whether such liabilities are debts, technically so called, or result from the nonfeasance or malfeasance of the association in respect of its binding obligations and duties"; and the receiver, being the active agent or fiduciary, may be made a party defendant to proceedings for the adjudication of a claim.<sup>23</sup>

A State court has no jurisdiction of the receiver of a national bank where he has not been made a party to the record, nor can such court force him to pay out moneys in satisfaction of a judgment against the bank which was recovered before his appoint-

<sup>21</sup> *National Bank of Commonwealth v. Mechanics' National Bank*, 94 U. S. 437, 24 L. ed. 176.

<sup>22</sup> *Chemical National Bank v. Bailey*, 12 Blatchf. 480.

Where one recovers from the receiver money which has been paid into the bank to redeem securities which were pledged to secure the note of a bank whose insolvency was concealed, one is not entitled to interest thereon. But to the amount so paid which did not come into the hands of a receiver one is entitled to be subrogated to the right to dividends of the reserve bank whose indebtedness it paid. *Hallett v. Fish*, 123 Fed. 201 (1913).

<sup>23</sup> *Turner v. The First National Bank of Keokuk*, 26 Iowa 562.

ment, since the receiver's duty is to pay all such moneys into the United States treasury.<sup>24</sup>

The moment a national bank goes into the hands of a receiver the federal law becomes the law of the distribution of its assets,<sup>24a</sup> and the State law that a check is an assignment *pro tanto* can have no effect when the federal law is different.<sup>24b</sup>

Authority to a receiver to sell assets in such manner as he deems best for the interest of all concerned, is not authority to exchange or barter assets.<sup>25</sup>

The United States has a prior lien over other creditors on the proceeds of the sale of bonds deposited as security for the circulation of national bank bills, as well as a prior claim in the distribution of the bank's assets for the payment of claims of the Government against such bank, and may apply the proceeds of such assets to the payment of its claim, *pro tanto*, for postal funds or money order funds deposited in such bank by the local postmaster.<sup>26</sup> U. S. Rev. Sts. § 5236, does not repeal this priority.<sup>27</sup> A bank, while engaged in business, pledged certain notes constituting a part of its assets to a creditor to secure indebtedness to him. The bank afterwards failed, and the receiver brought an action to recover the notes. *Held*, that he could not recover the notes until the whole indebtedness was paid.<sup>28</sup>

A claim approved by the Comptroller, or put in judgment, bears interest<sup>29</sup> from the time it is approved or entered, if the assets pay the claims in full, and this interest is to be paid by the Comptroller before distributing the surplus among the stockholders.<sup>30</sup>

A claim for damages by reason of failure of the bank to deliver a special deposit is upon the same plan as other debts. The

<sup>24</sup> Ocean National Bank v. Carll, 7 Hun (N. Y.) 237.

<sup>24a</sup> The distribution must be ratable. Emigh v. Earling, 134 Wis. 565, 115 N. W. 128, 27 L. R. A. (N. S.) 243 (1908), affirmed in 218 U. S. 27, 54 L. ed. 915, 30 Sup. Ct. 672. See also American Can Co. v. Williams, 176 Fed. 816 (1908).

<sup>24b</sup> First National Bank v. Seden, 120 Fed. 212 (1903).

<sup>25</sup> Ellis v. Little, 27 Kan. 707.

The receiver cannot sell real or personal property of a bank without an order of the court, and a sale not so authorized is void. Schofield v. Baker, 212 Fed. 504 (1914), affirmed in 221 Fed. 322.

<sup>26</sup> United States v. Cook County National Bank, 11 Chic. Leg. News 344.

<sup>27</sup> United States v. Cook County National Bank, 9 Biss. 55.

<sup>28</sup> Casey v. Credit Mobilier, 7 Chic. Leg. News 313; s. c. 2 Woods 77.

<sup>29</sup> National Bank of Commonwealth v. Mechanics' National Bank, 9 Chic. Leg. News 269, affirmed, 94 U. S. 437, 24 L. ed. 176.

<sup>30</sup> Chemical National Bank v. Bailey, 12 Blatchf. 480.

assets in the hands of the receiver are to be ratably divided to pay all legal liabilities of the bank, whether debts *strictu sensu*, or claims arising from nonfeasance or malfeasance.<sup>30o</sup>

A State statute providing for the payment by the receiver of an insolvent bank, in the first place, of deposits in the bank by savings banks, is in conflict with U. S. Rev. Sts. § 5236, when applied to an insolvent national bank. Such is not a ratable distribution.<sup>30a</sup>

A plaintiff in the case of an insolvent bank must make out a very clear equity before the court will allow him to be paid in full.<sup>31</sup>

Where at the time an insolvent national bank closed, a city, which had designated such bank as the authorized city depository, had therein a special deposit, and the bank had also collected for the city a draft in excess of the amount of the bond required from the bank as such depository, the proceeds of which draft it was sought to recover as a trust fund, the city had a right to apply the amount received on the bond on the special deposit, and to apply the balance on the other account.<sup>31a</sup> And where a city treasurer acquiesced in the retention by a national bank designated as the city's depository, of an amount collected by it for the city in excess of the amount of its bond as depository, a temporary injunction restraining the receiver of such insolvent bank from paying a dividend which would leave an insufficient amount to meet the city's claim, would not be denied on the ground that the city should first try to recover the amount from the city treasurer and his bondsmen and the city commissioner of finance, especially when there is no assurance that enough would thereby be realized to make the city whole, and when it was evident that before this could be ascertained the receivership would be closed up and a final disposition made of the assets of the bank.<sup>31a</sup>

(d) **Liability of Shareholders in Insolvent Banks.**<sup>32</sup> — The decision of the Comptroller as to a deficiency of assets is final, and cannot be questioned by a shareholder in a suit instituted against him to recover the amount assessed to be paid by him.<sup>33</sup> Neither can the shareholder plead *nul tiel corporation*, nor seek

<sup>30o</sup> *Turner v. The First National Bank of Keokuk*, 26 Iowa 562.

<sup>30a</sup> *Davis v. Elmira Savings Bank*, 161 U. S. 275, 40 L. ed. 700, 16 Sup. Ct. 502 (1896).

<sup>31</sup> *In re Bank of Madison*, 5 Biss. 515.

<sup>31a</sup> *Centralia v. United States National Bank*, 221 Fed. 755 (1915).

<sup>32</sup> See §§ 201, 202.

<sup>33</sup> *Ocean National Bank v. Carll*, 7 Hun (N. Y.) 237. See *Rankin v. Miller*, 207 Fed. 602 (1913).

to go behind the Comptroller's certificate for the purpose of showing any description of precedent irregularity in the proceedings.<sup>34</sup> A stockholder who has shared in the transactions of a *de facto* national bank, and has received dividends on his shares, being sued for his assessment, is estopped to deny the legality of the incorporation,<sup>35</sup> or the validity of the stock.<sup>35a</sup>

Where the Comptroller of the Currency assesses the shareholders in an insolvent national bank for the purpose of paying the debts of the bank, the sums assessed become payable immediately upon the making of the order, and interest may be computed from that date in all cases of delay in payment.<sup>36</sup>

Where the Comptroller of the Currency has declared a national bank to be insolvent, and has assessed the amount payable by the shareholders in respect of their shares, the liability of each shareholder to pay the amount due upon his shares is several, and collection of the amount may be made by a suit at law against him individually.<sup>37</sup>

Where a person holds shares in a national bank simply as collateral security for a loan, but nevertheless appears upon the books of the association as the absolute and legal owner, his liability to assessment, in the event of the bank becoming insolvent, is the same as that of any ordinary shareholder.<sup>38</sup>

The pledgee, having under the contract a right to sell the shares, may do so though he believes the bank to be insolvent, and his real motive in selling is to escape liability. The sale is not in fraud of creditors of the bank by reason of the existence of any such belief and motive in the mind of the vendor.<sup>39</sup> But where the vendor was an officer of the bank, cognizant of its condition, and the transfer was apparently made without consideration and to a person of no financial responsibility, a contrary rule was laid down, and the transfer was held to be in fraud of creditors and void.<sup>40</sup>

<sup>34</sup> *Casey v. Galli*, 94 U. S. 673, 24 L. ed. 168.

<sup>35</sup> *Wheelock v. Kost*, 77 Ill. 296.

<sup>35a</sup> *Tillinghast v. Baily*, 86 Fed. 46 (1897).

<sup>36</sup> *Casey v. Galli*, 94 U. S. 673, 24 L. ed. 168, overruling *Bowden v. Morris*, 1 Hughes 378; *Estate of Davis v. Watkins*, 56 Neb. 288, 76 N. W. 575.

<sup>37</sup> *Bailey v. Sawyer*, Thompson's National Bank Cas. 356.

<sup>38</sup> *Wheelock v. Kost*, 77 Ill. 296; *Magruder v. Colston*, 44 Md. 349; *Hale v. Walker*, 31 Iowa 344.

<sup>39</sup> *Magruder v. Colston*, 44 Md. 349.

<sup>40</sup> *Bowden v. Santos*, 1 Hughes 158.

§ 252. **Preferences.**<sup>1</sup> — Under section 52 of the act of 1864, a transfer of property made by a national bank to a creditor, the bank being already insolvent or in contemplation of insolvency,<sup>1a</sup> is void only when made for the purpose of preventing the distribution of the assets of the bank among its creditors, in accordance with the provisions of the act.<sup>1b</sup> Whence it follows that, if the transfer be based upon a sufficient consideration moving from the transferee to the bank contemporaneously with the transfer, the transaction is legal. It is only the paying or securing pre-existing debts that is illegal.<sup>2</sup>

In the cited case, a national bank, financially embarrassed, had deposited a part of its assets with a certain firm as security for a loan advanced at the same time by a third party; the president of the bank was a member of the firm. The court held the transaction legal, since the firm held the position simply of depositaries or stake holders; also because in this case the directors had ratified the action of the president, though taken by him in the first instance without authority from them.

It is unnecessary that the insolvency of the bank should be in the contemplation of the transferee.<sup>3</sup>

The bank advanced to H., who was a banker, the sum of \$10,000, less the usual charge of one eighth of one per cent. On the afternoon of the same day, H. placed certain securities in an envelope accompanied by a note, saying, "A disappointment gives us reason to fear that our check of this date may not be paid. I leave with you the enclosed as security." *Held*, that the securities were transferred with a view to give a fraudulent preference, and that the bank had reasonable cause to believe that H. was insolvent when it received and appropriated the securities presented to it.<sup>4</sup>

The bank, after knowledge of his insolvency, took from the debtor a note with power of attorney to confess judgment, on which it entered a judgment on the next day, and levied upon

<sup>1</sup> § 252. R. S. 5242. § 52.

<sup>1a</sup> See *Ball v. German Bank*, 187 Fed. 750 (1911).

<sup>1b</sup> Even if both the bank and the vendee are insolvent at the time of the transfer, it is not invalid unless such insolvency was known to the vendor. *Earle v. Carson*, 188 U. S. 42, 47 L. ed. 373, 23 Sup. Ct. 254 (1902).

<sup>2</sup> *Casey v. Credit Mobilier*, 2 Woods 77; *Stapylton v. Stockton*, 91 Fed. 326 (1899); *Hayden v. Chemical National Bank*, 84 Fed. 874 (1898).

<sup>3</sup> *Case v. Citizens' Bank of Louisiana*, 2 Woods 23.

<sup>4</sup> *Merchants' National Bank v. Cook*, 10 Chic. Leg. News 82; s. c. 95 U. S. 342, 24 L. ed. 412.

and sold the property of the debtor to satisfy the same. The assignee in bankruptcy of the debtor brought suit to recover the money. *Held*, that the act constituted a fraudulent preference. Also *held*, that the receipt of moneys by the bank in collections for the debtor, which were by it turned over to the sheriff to be levied upon, was a fraudulent preference, and did not raise the question of set-off. Also *held*, that the taking a check from the bankrupt, and crediting the amount of the check then on deposit on the bankrupt's note the day before taking judgment, was a payment by way of preference, and therefore void, and did not raise the question of set-off.<sup>5</sup>

When a national bank becomes insolvent, the rights and liabilities between itself and its creditors are fixed at the appointment of a receiver, and no lien can be created, or right or preference obtained afterward.<sup>6</sup>

When a national bank becomes insolvent the deposit of public funds therein by a public officer is not entitled to priority of payment even though the deposit was wrongful and known by the bank to be so.<sup>6a</sup>

When a national bank holds funds as trustee it may be recovered if it can be traced into the estate, and has augmented it.<sup>6b</sup>

If deposits are received when the bank knows itself to be insolvent they remain the property of the depositor and may be recovered.<sup>6c</sup>

An attachment against an insolvent national bank, invalid under U. S. Rev. Sts. § 5242, is not rendered valid by its subsequent acquisition of further capital.<sup>7</sup>

U. S. Rev. Sts. § 5242, prohibiting attachments against insolvent national banks, was not intended to protect the receiver's custody of property not owned by the bank.<sup>8</sup> See § 257 a.

<sup>5</sup> *Traders' Bank v. Campbell*, 14 Wall. 87, 20 L. ed. 832.

<sup>6</sup> *Balch v. Wilson*, 25 Minn. 299.

<sup>6a</sup> *Lucas County v. Jamison*, 170 Fed. 338 (1908).

<sup>6b</sup> *Hallett v. Fish*, 120 Fed. 986 (1903); *Lucas County v. Jamison*, 170 Fed. 338 (1908); *Cherry v. Territory*, 17 Okla. 221, 89 Pac. 192, 8 L. R. A. (N. S.) 1254 (1906). See *Emigh v. Earling*, 134 Wis. 565, 115 N. W. 128, 27 L. R. A. (N. S.) 243 (1908), affirmed in 218 U. S. 27, 54 L. ed. 915, 30 Sup. Ct. 672.

<sup>6c</sup> *Cherry v. Territory*, *supra*; *In re Indianoma Bank*, 17 Okla. 605, 89 Pac. 196 (1906).

<sup>7</sup> *Raynor v. Pacific National Bank of Boston*, 93 N. Y. 371.

<sup>8</sup> *Corn Exchange Bank of Chicago v. Blye*, 101 N. Y. 303, 4 N. E. 635; *Commonwealth v. Chestnut Street National Bank*, 189 Pa. St. 606, 43 Atl. 300.

Under U. S. Rev. Sts. § 5242 a national bank, whether solvent or insolvent, is exempt from attachment before judgment in any State, county or municipal court.<sup>9</sup>

Jurisdiction by a State court to attach a national bank before final judgment in said court cannot be conferred by consent of the parties, and the want of jurisdiction cannot be waived.<sup>10</sup>

But U. S. Rev. Sts. § 5242, prohibiting attachments, injunction or execution before final judgment is not violated by the appointment of a receiver by a State court when the appointment is made a part of the final judgment.<sup>11</sup>

§ 253. **Liability of Directors.**<sup>1</sup> — U. S. Rev. Sts. § 5239 applies only to violations of the act itself, by the assumption on the part of directors of powers in excess of the corporate franchises, or by a disregard of the prohibitions contained in the act.<sup>2</sup>

Under this section an action<sup>2a</sup> may be maintained by a national bank against its officers and directors before a suit for

<sup>9</sup> *Pacific National Bank v. Mixter*, 124 U. S. 721, 31 L. ed. 567, 8 Sup. Ct. 718 (1888); *Van Reed v. People's National Bank*, 198 U. S. 554, 49 L. ed. 1161, 25 Sup. Ct. 775 (1905); *Meyer v. First National Bank*, 10 Idaho 175, 77 Pac. 334.

<sup>10</sup> *Merchants' Laclede Bank v. Troy Grocery Co.*, 144 Ala. 605, 39 So. 476 (1905).

<sup>11</sup> *Cogswell v. Second National Bank*, 76 Conn. 252, 56 Atl. 574 (1903).

<sup>1</sup> § 253. R. S. 5239. § 53.

<sup>2</sup> *Brinckerhoff v. Bostwick*, 88 N. Y. 52.

Attesting a bank's report is not a participating in or assenting to a violation of the statute. *Mason v. Moore*, 73 Ohio St. 275, 76 N. E. 932, 4 L. R. A. (n. s.) 597, n. (1906).

<sup>2a</sup> The action may be brought in equity, *McKinnon v. Morse*, 177 Fed. 576 (1910); *Rankin v. Cooper*, 149 Fed. 1010 (1906); *Emerson v. Gaither*, 103 Md. 564, 64 Atl. 26, 8 L. R. A. (n. s.) 738, n. (1906); *Boyd v. Schneider*, 131 Fed. 223 (1904); but see *Corsicana National Bank v. Johnson*, 218 Fed. 822; and even while the affairs of the bank are unliquidated, *Williams v. Brady*, 221 Fed. 118 (1915); and in the State court, *Yates v. Jones National Bank*, 206 U. S. 158, 51 L. ed. 1002, 27 Sup. Ct. 638 (1906), reversing 74 Neb. 734, 105 N. W. 287; by the stockholders, while the bank remains a going concern, *Yates v. Jones National Bank*, 74 Neb. 734, 105 N. W. 287 (1905); *Hanna v. Lyon*, 179 N. Y. 107, 71 N. E. 778 (1904); *Zinn v. Baxter*, 65 Ohio St. 341, 62 N. E. 327 (1901) by the depositors, after its insolvency, *Boyd v. Schneider*, 131 Fed. 223 (1904), or by one who is injured by the publication of a false report. *Chesbrough v. Woodworth*, 195 Fed. 875 (1912).

For cases on pleading see *Allen v. Luke*, 141 Fed. 694 (1906); *id.*, 163 Fed. 1018; *McKinnon v. Morse*, 177 Fed. 576 (1910); *Williams v. Brady*, 221 Fed. 118 (1915); *Boyd v. Schneider*, 131 Fed. 223 (1904); *Chesbrough v. Woodworth*, 195 Fed. 875 (1912); *Thomas v. Taylor*, 224 U. S. 73, 56 L. ed. 673, 32 Sup. Ct. 403 (1912).



that purpose is brought by the Comptroller and before the association has been dissolved.<sup>3</sup>

Under this section an action may be maintained by one who purchased stock in a bank relying upon a false report of its condition if he suffers damage thereby, against any officer or director who knowing of its falsity authorizes such report.<sup>4</sup> Such a person must sue in his own right, and the issue is not one of negligence but whether the directors caused or permitted to be made a statement of the bank's condition which they knew to be false and upon which plaintiff relied to his damage.<sup>4</sup> The liability of the directors is several and suit may be against one or two or more joined, but it must appear that the director sued either acted or assented to the action or participated in or assented to the wrongful inactivity. But the fact that excessive loans have been made is immaterial.<sup>4</sup>

The statutory liability of directors does not relieve them from their common law liabilities,<sup>5</sup> nor will ill health or business engagements excuse a failure to use ordinary diligence.<sup>5a</sup>

U. S. Rev. Sts. § 5239 affords the exclusive rule by which to measure the right to recover damages from directors based upon a loss alleged to have resulted solely from the violation by such directors of a duty expressly imposed upon them by a provision of this section.<sup>6</sup>

No higher duty or standard of conduct may be rightfully established and demanded of a director than that expressly imposed by U. S. Rev. Sts. § 5239.<sup>7</sup>

<sup>3</sup> *National Bank v. Wade*, 84 Fed. 10 (1897); *Allen v. Luke*, 141 Fed. 694 (1906); *Boyd v. Schneider*, 124 Fed. 239 (1902); *Zinn v. Baxter*, 65 Ohio St. 341, 62 N. E. 327 (1901).

<sup>4</sup> *Chesbrough v. Woodworth*, 195 Fed. 875 (1912); *id.*, 221 Fed. 912 (1915); *Thomas v. Taylor*, 224 U. S. 73, 56 L. ed. 673, 32 Sup. Ct. 403 (1912); *King v. Pomeroy*, 121 Fed. 287 (1903); *Macdonald v. De Fremery*, 168 Cal. 189, 142 Pac. 73 (1914); *Yates v. Stapelhurst Bank*, 74 Neb. 734, 105 N. W. 287 (1906); *Yates v. Utica Bank*, 206 U. S. 181, 51 L. ed. 1015, 27 Sup. Ct. 646 (1906).

<sup>5</sup> *Allen v. Luke*, 163 Fed. 1018 (1908); *Williams v. Brady*, 221 Fed. 118 (1915).

The action against a director for causing loss because of negligence survives and the executor may be joined as party defendant. The bill describing the action must be explicit. *Allen v. Luke*, *supra*.

<sup>5a</sup> *Rankin v. Cooper*, 149 Fed. 1010 (1906).

<sup>6</sup> *Yates v. Jones National Bank*, 206 U. S. 158, 51 L. ed. 1002, 27 Sup. Ct. 638 (1906), reversing 74 Neb. 734, 105 N. W. 287; *Thomas v. Taylor*, 224 U. S. 73, 56 L. ed. 673, 32 Sup. Ct. 403 (1912).

<sup>7</sup> *Jones National Bank v. Yates*, 93 Neb. 121, 139 N. W. 844 (1913).

Under this section an action cannot be brought by the creditors of an insolvent bank to recover for general distribution sums alleged to have been lost through the negligence or mismanagement of the bank by its directors. The receiver is the proper party to sue for the benefit of both creditor and stockholder.<sup>8</sup>

The Comptroller may maintain a suit to forfeit the charter of a bank which was located in a suburb of a city but which without complying with the order of the Comptroller moved to the city proper after it had annexed the suburb.<sup>9</sup>

In an action by a national bank to recover damages sustained by it as a result of excessive\* loans made by former directors in violation of U. S. Rev. Sts. § 5239 the proper issues to be submitted to the jury are (1) Whether the loans made were made at a time when the borrower was already indebted to the bank in a sum equal to one tenth of its capital actually paid in. (2) Whether such loans were knowingly made or assented to by the directors. (3) What portion of the money so loaned was lost.<sup>10</sup>

While directors may delegate their duties to others they still remain liable for loss resulting from a neglect of reasonable supervision,<sup>11</sup> but if they are not negligent they are not responsible for loss even though the agent is negligent.<sup>12</sup>

Directors are not liable for mere error of judgment.<sup>13</sup>

§ 254. **Appointment of Examiner.**<sup>1</sup> — The appointment of an examiner by the Comptroller does not operate as the appointment of a temporary receiver, neither does it exempt the tangible assets of a national bank from levy under execution upon final judgment.<sup>2</sup>

<sup>8</sup> *Boyd v. Schneider*, 124 Fed. 239 (1903). See *Allen v. Luke*, 141 Fed. 694 (1905). See also *Boyd v. Schneider*, 131 Fed. 224 (1904), which holds that the right of the receiver is not exclusive, and to the extent the directors are responsible directly to the depositors they have a right of action by a bill in equity.

<sup>9</sup> *First National Bank v. Murray*, 212 Fed. 140 (1914).

<sup>10</sup> *City National Bank v. Crow*, 27 Okla. 107, 111 Pac. 210, 1912B Ann., Cas. 647, n.

<sup>11</sup> *Williams v. Brady*, 221 Fed. 118 (1915); *Rankin v. Cooper*, 149 Fed. 1010 (1906).

<sup>12</sup> *Rankin v. Cooper*, 149 Fed. 1010 (1906); *National Bank v. Fridenberg*, 206 Pa. St. 243, 55 Atl. 960 (1903).

<sup>13</sup> *Williams v. Brady*, 221 Fed. 118 (1915); *Rankin v. Cooper*, 149 Fed. 1010 (1906).

<sup>1</sup> § 254. R. S. 5240. § 54. See Fed. Res. Act, § 21.

<sup>2</sup> *Kimball v. Dunn*, 89 Fed. 782 (1898).

The examiner has authority to make a thorough examination of the affairs of the bank,<sup>3</sup> but he has no authority to negotiate for the replenishing of the assets of the bank, and any information given to either party would be voluntary on his part and would not subject the bank to responsibility for his statements.<sup>4</sup>

§ 255.<sup>1</sup> A violation of the provisions of U. S. Rev. Sts. § 5208, in over certifying checks, does not preclude a national bank from enforcing its claim out of collaterals pledged to secure the obligations of the drawer of the checks.<sup>2</sup>

A cashier who included in the aggregate of his "cash item" a particular item based upon known worthless checks will not be liable for a false entry under U. S. Rev. Sts. § 5209, since the entry is a truthful statement of the transaction.<sup>3</sup>

§ 256. The provision<sup>1</sup> as to the conduct of suits by district attorneys is so far directory that stockholders cannot set it up to defeat a suit conducted by private counsel employed by a receiver with the approval of the Treasury Department.<sup>2</sup>

§ 257. **Jurisdiction of National and State Courts.**<sup>1</sup>—In questions which have arisen as to jurisdiction, and in what courts a national banking association may properly appear as a party in a cause, it has been declared that the bank is to be regarded as located in the place specified in its certificate of organization, and its corporators will be assumed to be citizens of the State in which such place is situated. The effort was made to argue that, since the incorporation was under national legislation, the only inference which could be drawn from it was that the corporators were citizens of the United States. But the court ruled otherwise, preferring the presumption as to *habitat* as

<sup>3</sup> *Easton v. Iowa*, 188 U. S. 220, 47 L. ed. 452, 23 Sup. Ct. 288 (1903).

<sup>4</sup> *Tecumseh National Bank v. Chamberlain Banking House*, 63 Neb. 163, 88 N. W. 186, 57 L. R. A. 811 (1901).

<sup>1</sup> § 255. R. S. 5208. § 53.

<sup>2</sup> *Thompson v. Saint Nicholas National Bank*, 47 Hun (N. Y.) 621.

<sup>3</sup> *United States v. Young*, 128 Fed. 111 (1904); *Twining v. United States*, 141 Fed. 41 (1905).

A violation of U. S. Rev. Sts. § 5209 constitutes an offence against the United States within the meaning of § 5440. *Scott v. United States*, 130 Fed. 429 (1904).

See *United States v. Breese*, 131 Fed. 915 (1904), for the meaning of the term "embezzlement", "abstracts", "wilfully misapplies", and "intent to defraud" as used in U. S. Rev. Sts. § 5209.

<sup>1</sup> § 256. R. S. 380. § 56.

<sup>2</sup> *Kennedy v. Gibson*, 8 Wall. 498, 19 L. ed. 476.

<sup>3</sup> § 257. R. S. 563 (15), 629 (10, 11). §§ 57, 82, 70. See *Usury*, § 230 *m*. See § 208 *f*.

above stated. Accordingly it was held that a national bank could bring a suit in a Circuit Court of the United States, sitting in another State, against a defendant who was a citizen of such other State.<sup>2</sup> Also a national bank has the right of a citizen in the State wherein it is located, and as such may insist upon the removal of a cause from a State to a national court.<sup>3</sup>

It has, however, been said that the receiver of a national bank has not a prerogative right to be sued in the United States courts, and therefore an order made only upon the ground of such prerogative right for the removal of a suit against a receiver from a State into a Federal court will be vacated.<sup>4</sup>

A national bank derives its right to sue from the Currency Act of 1864, and not from the Judiciary Act; whence it follows that the eleventh section of the Judiciary Act, limiting the jurisdiction of the Federal courts as to suits brought in behalf of an assignee on promissory notes and other choses in action, does not affect the right of a national bank to sue in the United States Circuit Court.<sup>5</sup>

"The 59th section of the act of February 25th, 1863, provides that all suits *by* or *against* such associations may be brought in the proper courts of the United States or of the State. The 57th section of the act of 1864 relates to the same subject, and revises and enlarges the provisions of the 59th section of the preceding act. In the latter, the word *by* in respect to such suits is dropped. The omission was doubtless accidental. It is not to be supposed that Congress intended to exclude the associations from suing in the courts where they can be sued. The difference in the language of the two sections is not such as to warrant the conclusion that it was intended to change the rule prescribed by the act of 1863. Such suits may still be brought by the associations in the courts of the United States. If this be not the proper construction, while there is provision for suits *against* the associations, there is none for suits *by* them in any court." <sup>6</sup>

<sup>2</sup> *Manufacturers' National Bank v. Baack*, 8 Blatchf. 137; s.c. 2 Abb. (U. S.) 232; *Davis v. Cook*, 9 Nev. 134.

<sup>3</sup> *Chatham National Bank v. Merchants' National Bank*, 4 Thomp. & C. (N. Y.) 196.

<sup>4</sup> *Bird's Executors v. Crockrem*, 2 Woods 32.

<sup>5</sup> *Commercial Bank of Cleveland v. Simmons*, 10 Alb. Law Jour. 155.

<sup>6</sup> *Kennedy v. Gibson*, 8 Wall. 498, 19 L. ed. 476; *Manufacturers' National Bank v. Baack*, 8 Blatchf. 137; s. c. 2 Abb. (U. S.) 232; *Main v. Second National Bank*, 6 Biss. 26.

A national bank can be sued as defendant in a District Court of the United States only when the bank is "located" or "established" within the district over which such court has jurisdiction. The fact that service of process is effected upon an officer of the bank within such district does not suffice to confer jurisdiction upon the court. The corporation is not "found" within the district because one of its officers is found there, so as to bring it within the meaning of section 11 of the Judiciary Act of 1789.<sup>7</sup>

But a national bank is not compelled to have recourse to the forum of the national courts. It has the same right as any other person or corporation to appear as plaintiff in the State courts, if it see fit so to do.<sup>8</sup> It may also be sued in the courts of the State in which it is located.<sup>9</sup>

It has been held in New York that section 57 of the act of 1864 does not modify or control section 8, and that consequently a national bank may be sued in the State courts of a State other than that in which it is situated.<sup>10</sup>

This, however, cannot be considered to be the law, inasmuch as the Supreme Court of the United States has asserted the contrary doctrine.<sup>11</sup> So also has Judge Blatchford, adding that jurisdiction cannot be conferred upon the State court even by the appearance of the defendant, and waiver on his part of all objection on the ground of lack of jurisdiction.<sup>12</sup>

It has been held in Massachusetts, in construing the same sections, that the intention of Congress is manifest that a banking association organized under the act can be "sued, either in the Federal or in the State courts, only in the judicial district in which it is established, and in which its officers may be summoned and its books brought into court with the least interruption and inconvenience to its business; and that the election of the plaintiffs to sue in any court whatever should be confined within these limits in all cases."<sup>13</sup>

In Connecticut it has been held that section 57 does not confer

<sup>7</sup> *Main v. Second National Bank*, 6 Biss. 26.

<sup>8</sup> *First National Bank of Montpelier v. Hubbard*, 49 Vt. 1.

<sup>9</sup> *Adams v. Daunis*, 29 La. Ann. 315.

<sup>10</sup> *Cooke v. State National Bank of Boston*, 50 Barb. (N. Y.) 339, affirmed 52 N. Y. 96.

<sup>11</sup> *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383, 20 L. ed. 840.

<sup>12</sup> *Cadle v. Tracy*, 11 Blatchf. 101.

<sup>13</sup> *Crocker v. Marine National Bank*, 101 Mass. 240.

upon a State court jurisdiction over an information in the nature of a *quo warranto* to try the right to office of a director in a bank organized under the act of 1864.<sup>14</sup>

Under the New York statutes, a national bank located in another State cannot keep an office in New York for the purpose of discount and deposit, and therefore there can be no recovery in the courts of New York upon paper discounted at such an office in violation of the statutes.<sup>15</sup>

Section 57 of the act of 1864 and the amendment by section 2 of the act of 1873 (ch. 269) are constitutional, as being a provision tending to promote the efficiency of the national banks by protecting them against suits and proceedings in State courts, whereby that efficiency might be impaired.<sup>16</sup>

A District Court of the United States is a "court of record of competent jurisdiction", within the meaning of section 50 of the act of 1864.<sup>17</sup>

A national bank must give security for payment of the costs of a suit instituted in a State court, when a statute of the State requires "a foreign corporation created by the laws of any other State or country" to give such security.<sup>18</sup>

A receiver of an insolvent national bank may sue in the Federal court of the district in which the bank was situated, against citizens of the same State, shareholders in the bank, to recover assessments due from them.<sup>19</sup>

The Federal Circuit Court has jurisdiction in all cases in which a national bank in the same district is a party, no matter who is the other, or what may be the subject matter.<sup>20</sup>

An action for rent of premises for an unexpired term of a lease brought by the lessor against a stockholder's agent is a suit to wind up the affairs of the bank of which the Circuit Court of the United States has jurisdiction.<sup>20a</sup>

<sup>14</sup> *State v. Curtis*, 35 Conn. 374.

<sup>15</sup> *National Bank of Fairhaven v. The Phoenix Warehousing Co.*, 6 Hun (N. Y.) 71.

<sup>16</sup> *Chesapeake Bank v. First National Bank of Baltimore*, 40 Md. 269.

<sup>17</sup> *Platt's Petition*, 1 Ben. (C. C.) 534.

<sup>18</sup> *Cooke v. State National Bank of Boston*, 50 Barb. (N. Y.) 339, affirmed in 52 N. Y. 96; *National Park Bank v. Gunst*, 1 Abb. N. Cas. (N. Y.) 292.

<sup>19</sup> *Price v. Abbott*, 17 Fed. 506.

<sup>20</sup> *Mitchell v. Walker*, 25 Inter. Rev. Record, 64.

<sup>20a</sup> *International Trust Co. v. Weeks*, 203 U. S. 364, 51 L. ed. 224, 27 Sup. Ct. 69 (1906).

But beyond its district the national bank can sue only as any other individual may.<sup>21</sup>

As to jurisdiction of the Federal courts, a national bank is a citizen of the State where it is located,<sup>22</sup> for the purpose of suing and being sued in the Circuit Courts of the United States.<sup>22a</sup>

(a) **Attachments in State Courts.**<sup>22b</sup> — Under section 57, an attachment made by a State court against a national bank will be vacated if made before final judgment.<sup>23</sup> But it has been said that this rule applies only to actions brought against a bank in the State of its location, and not to cases where the bank is a non-resident of the State.<sup>24</sup>

Under U. S. Rev. Sts. § 5798, an attachment cannot be issued by a State court against a national bank, which is, or is about to become, insolvent.<sup>25</sup>

The last clause of U. S. Rev. Sts. § 5242, only applies to such national banks as have committed, or are contemplating, an act of insolvency, and does not prohibit the issuing of an attachment against the property of a solvent national bank, located and doing business in another State.<sup>26</sup>

But *Van Reed v. People's National Bank*<sup>26a</sup> citing *Pacific National Bank v. Mixer*<sup>26b</sup> holds that there can be no attachment even when the bank is solvent.

**United States.** — The property of a bank cannot be sold on an attachment made after the bank became insolvent, when the same property is claimed by a receiver of the bank, who was appointed after the attachment was issued. The receiver may move to set aside an attachment in an action in which the property of the bank has been seized.<sup>27</sup>

<sup>21</sup> *St. Louis National Bank v. Brinkman*, 1 Fed. 45.

<sup>22</sup> *St. Louis National Bank v. Allen*, 2 McCrary 92.

<sup>22a</sup> *Continental National Bank v. Buford*, 191 U. S. 119, 48 L. ed. 119, 24 Sup. Ct. 54 (1903).

<sup>22b</sup> See § 52.

<sup>23</sup> *Central National Bank v. Richland National Bank*, 52 How. Pr. (N. Y.) 136; *First National Bank v. La Due*, 39 Minn. 415, 40 N. W. 367.

<sup>24</sup> *Southwick v. First National Bank of Memphis*, 7 Hun (N. Y.) 96.

<sup>25</sup> *National Shoe & Leather Bank v. Mechanics' National Bank of Newark*, 89 N. Y. 467.

<sup>26</sup> *Robinson v. National Bank of New Berne*, 19 Hun (N. Y.) 477.

<sup>26a</sup> 173 N. Y. 314, 66 N. E. 16, 105 Am. St. Rep. 666 (1903), affirmed in 198 U. S. 554, 49 L. ed. 1161, 25 Sup. Ct. 775.

<sup>26b</sup> 124 U. S. 721.

<sup>27</sup> *National Bank v. Colby*, 21 Wall. 609, 22 L. ed. 687.

**Alabama.** — A state court has no jurisdiction of an attachment against a national bank before final judgment, either by consent of the parties or by waiver or want of it; <sup>27a</sup> and if any proceedings have been taken they are void and no lien is thereby acquired. <sup>27a</sup>

**New York.** — Under the amendment of 1873, c. 269, § 2, providing that "no attachment," etc., the State courts are not prohibited from attaching the property of non-resident banks. The clause relates only to actions against associations located where the suit is brought. <sup>28</sup>

**Maryland.** — An attachment was issued by a State court against a non-resident national bank, and another bank was summoned as garnishee. The court below quashed the attachment. On appeal, *held*, that under the amendment of section 57 by section 2 of the act of 1873, the attachment was void; that Congress has power to create national banks, and make any provisions which tend to promote their efficiency, and to protect them not only against State legislation, but also against suits or proceedings in State courts, by which their efficiency would be impaired. <sup>29</sup>

**Vermont.** — The property of a national bank cannot be attached, and trusteeing a debt due such a bank is therefore impracticable. <sup>29a</sup>

Whether the bank be a resident or non-resident, an attachment cannot issue until final judgment. <sup>30</sup>

**Maine.** — A national bank may attach the shares of its stock held by its debtor, in order to secure its claim. <sup>31</sup>

(b) **Injunctions against Officers.** — The Circuit Courts of the United States have power, upon a bill filed by a shareholder in a national bank, to enjoin the officers from transactions in violation of the requirements of their charter, and which cause a waste of the assets of the bank to the loss and injury of the complainant and other shareholders. <sup>32</sup>

(c) **Removal of Suits.** <sup>33</sup> — The fact that a national bank is defendant or plaintiff in a suit is not of itself a ground for re-

<sup>27a</sup> *Merchants' Laclede National Bank v. Troy Grocery Co.*, 144 Ala. 605, 39 So. 476 (1905).

<sup>28</sup> *Southwick v. First National Bank of Memphis*, 7 Hun (N. Y.) 96.

<sup>29</sup> *Chesapeake Bank v. First National Bank*, 40 Md. 269.

<sup>29a</sup> *Safford v. Bank*, 61 Vt. 373, 17 Atl. 748.

<sup>30</sup> *Central National Bank v. Richland National Bank*, 52 How. Pr. (N. Y.) 136.

<sup>31</sup> *Hagar v. National Union Bank*, 63 Me. 509.

<sup>32</sup> *Shoemaker v. National Mechanics' Bank*, 2 Abb. (U. S.) 416.

<sup>33</sup> R. S. 640. §§ 57, 70, 82.



removal from a State court to the Federal. Section 640 of the Rev. Sts. remains in force, so far as not repugnant to the act of March 3, 1875, and therefore national banks are expressly excepted from the right of removal.<sup>34</sup>

§ 259. **Criminal Cases.**<sup>1</sup> — Where an officer of a national bank embezzles a special deposit, though in the shape of money, he is guilty of larceny, and, the national statute being silent as to this crime, he is amenable to the statutory provisions of the State where the bank is located.<sup>2</sup> But where a deposit is intended to be mingled with the assets, and become a part of the general property of the bank, and it is purloined by an officer of the bank, the offence is not one cognizable within the criminal jurisdiction of a State court.<sup>3</sup>

The courts of the United States being vested with the exclusive jurisdiction of all crimes which are punishable by the acts of Congress, an officer of a national bank who is guilty of embezzling the funds of the association does not come within the cognizance of the courts of the State where the bank is located.<sup>4</sup> Further, since by the act of 1864 the defaulting cashier of a national bank is guilty of a misdemeanor simply, therefore an accessory to the fact does not come within the statute provisions of a State which makes the act of the principal a felony.<sup>4</sup>

If an officer of a national bank is guilty of larceny, and not embezzlement, as where he purloins money from the bank at night-time, when such money is not intrusted to his keeping and he has no right of access to it, he will come within the jurisdiction of a State court, provided that the laws of the State where the bank is located make the offence charged against him larceny.<sup>5</sup>

Where the person is guilty of the larceny of bills or notes issued by a national bank, he may be indicted for the larceny of United States currency.<sup>6</sup>

An averment in an indictment that the money embezzled

<sup>34</sup> *Petillon v. Noble*, 9 Chic. Leg. News 314 (Biss.); *Wilder v. Union National Bank*, 12 Chic. Leg. News 75 (Biss.); *Bird's Executors v. Cockrem*, 2 Woods 32.

<sup>1</sup> § 259. R. S. 5208, 5209, 5415. §§ 55, 59, 79.

<sup>2</sup> *State v. Tuller*, 34 Conn. 280; *Commonwealth v. Tenney*, 97 Mass. 50.

<sup>3</sup> *State v. Tuller*, 34 Conn. 280.

<sup>4</sup> *Commonwealth v. Felton*, 101 Mass. 204.

<sup>5</sup> *Commonwealth v. Barry*, 116 Mass. 1; compare *Commonwealth v. Felton*, 101 Mass. 204.

<sup>6</sup> *State v. Gasting*, 23 La. Ann. 609.

was lawful legal tender money of the United States is surplusage, and need not be proved.<sup>6a</sup>

Upon an indictment under section 55 of the act of 1864, the intent is conclusively shown upon proof of the defendant having actually committed the acts charged against him, and evidence of the motives or authority of the guilty party is not admissible in evidence.<sup>7</sup>

An indictment under U. S. Rev. Sts. § 5209, which does not say that the act was done without the knowledge of the board of directors or governing discount committee is fatally defective.

Loss must be averred and facts set forth to show it was unlawful. So where an indictment alleges that misapplication of funds was made by payments of checks drawn on the bank in which one had no money on deposit, the government cannot show that the credit of checks in the bank was fictitious since there is no charge to that effect in the indictment, and when an indictment charges one with wilfully misapplying the money, funds and credits of the bank there must be a particular description of the funds and credits so that a defence may be properly prepared.<sup>7a</sup> A letter written by a director to the Comptroller after the misapplication is inadmissible.<sup>7b</sup>

An indictment which charges that a false entry was made with intent to deceive an agent appointed to examine the affairs of the association, to wit, the Comptroller of the Currency of the United States, is good<sup>7c</sup> even though the false entry was in a voluntary report.<sup>7d</sup>

<sup>6a</sup> *Porter v. United States*, 91 Fed. 494 (1898).

<sup>7</sup> *United States v. Taintor*, 11 Blatchf. 374.

<sup>7a</sup> *United States v. Smith*, 152 Fed. 542 (1907); *United States v. Eastman*, 132 Fed. 551 (1904). But see *United States v. Heinze*, 161 Fed. 425 (1908).

<sup>7b</sup> *Dickinson v. United States*, 159 Fed. 801 (1908).

<sup>7c</sup> *United States v. Corbett*, 215 U. S. 233, 54 L. ed. 173, 30 Sup. Ct. 81 (1909), reversing 162 Fed. 687 (1908).

As to sufficiency of indictment for,

a, embezzlement, see *United States v. Eastman*, 132 Fed. 551 (1904).

b, wilful misapplication, see *United States v. Heinze*, 218 U. S. 547, 54 L. ed. 1145, 31 Sup. Ct. 102 (1910); *id.*, 218 U. S. 532, 54 L. ed. 1139, 31 Sup. Ct. 98 (1910); *id.*, 183 Fed. 907 (1909); *Stout v. United States*, 227 Fed. 799 (1915); *Keliher v. United States*, 193 Fed. 8 (1912); *id.*, *Hillegass v. United States*, 183 Fed. 199 (1910); *United States v. Morse*, 161 Fed. 429 (1908); *United States v. Eastman*, 132 Fed. 551 (1904). The following were held to be insufficient. *United States v. Martindale*, 146 Fed. 280 (1906); *United States v. Norton*, 188 Fed. 256 (1911); *United States v. Smith*, 152 Fed. 542 (1907).

An indictment charging that entries were made with intent to injure and defraud the bank is insufficient when it does not show how this could be.<sup>7c</sup>

The indictment need not allege that the acts were done feloniously.<sup>7e</sup>

When consent of directors is relied upon as a defence it must be proved as a defence where the transaction appears to be one to which it cannot be presumed the directors would consent, and it must also be shown that such consent was given in good faith with knowledge of the facts.<sup>7f</sup>

But when the indictment is for conspiracy to embezzle, abstract or wilfully misapply funds the consent of directors cannot be a defence.<sup>7g</sup>

Return of the money is no defence.<sup>7h</sup>

If in an action for embezzlement under the U. S. Rev. Sts. § 5209, it appears that the funds of the bank have been abstracted or wilfully misapplied <sup>7i</sup> by the defendant, he is precluded from denying that it was done with unlawful intent. Congress intended to make criminal the conversion and misapplication of the funds, whether the party misapplying received any advantage or not.<sup>8</sup>

*c*, false entries, see *Norton v. United States*, 205 Fed. 593 (1913); *Billingsley v. United States*, 178 Fed. 653 (1910); *United States v. Norton*, 188 Fed. 256 (1911); *Richardson v. United States*, 181 Fed. 1 (1910); *United States v. Corbett*, 215 U. S. 233, 54 L. ed. 173, 30 Sup. Ct. 81 (1909); *United States v. Morse*, 161 Fed. 429 (1908); *Clement v. United States*, 149 Fed. 305 (1906).

*d*, reports, see *Phillips v. United States*, 201 Fed. 259 (1912); *Harper v. United States*, 170 Fed. 385 (1909); *Clement v. United States*, 149 Fed. 305 (1906).

<sup>7d</sup> *Harper v. United States*, 170 Fed. 385 (1909).

<sup>7e</sup> *United States v. Eastman*, 132 Fed. 551 (1904).

<sup>7f</sup> *McKnight v. United States*, 115 Fed. 972 (1902).

<sup>7g</sup> *United States v. Breese*, 173 Fed. 402 (1909).

<sup>7h</sup> *Norton v. United States*, 205 Fed. 593 (1913); *United States v. Morse*, 161 Fed. 429 (1908).

<sup>7i</sup> In order to misapply the funds there must be a withdrawal thereof from the control of the bank so that the bank will be deprived of their benefit. *Prettyman v. United States*, 180 Fed. 30 (1910); *United States v. Steinman*, 172 Fed. 913 (1909); *United States v. Morse*, 161 Fed. 429 (1908); *United States v. Martindale*, 146 Fed. 280 (1906); *United States v. Breese*, 131 Fed. 915 (1909); *Lear v. United States*, 147 Fed. 349 (1906). The withdrawal must be with the knowledge or consent of the bank. *Brock v. United States*, 149 Fed. 173 (1906); *United States v. Breese*, 131 Fed. 915 (1909). But see *Keliher v. United States*, 193 Fed. 8 (1912); *Stout v. United States*, 227 Fed. 799 (1915).

<sup>8</sup> *United States v. Lee*, 12 Fed. 816.

There can be no conviction for embezzlement under U. S. Rev. Sts. § 5209, unless there is proof of an intent to injure and defraud the bank. But if the acts are proved the intent must be inferred; <sup>80</sup> it is, however, rebuttable.<sup>8a</sup>

So also is one punishable, if, with intent to defraud the bank, one permits a firm of which one is a member to overdraw its account. There is no distinction between a loan made in bad faith for the purpose of defrauding the bank and a misappropriation in another form.<sup>9</sup>

Where it is shown that the president of a national bank wilfully and purposely refrained from investigating an account against which checks were drawn, it is not necessary to show actual knowledge on his part that the account was insufficient for the demands made upon it.<sup>9a</sup>

When the president of a national bank draws a check on depositors in favor of a third person to enable him to appropriate the money to his own use, without any consideration moving to the bank, he has committed a crime under U. S. Rev. Sts. § 5209.<sup>9b</sup>

It is a misdemeanor to violate the provisions of U. S. Rev. Sts. § 5209, and one who abets an officer or agent in any such violation may be prosecuted and punished even though the principal dies before the abettor is indicted.<sup>9c</sup>

In an indictment for aiding and abetting a cashier to wilfully abstract the funds of the bank, the defendant may show the value of the property of a corporation whose notes are given as security for an overdraft as tending to show defendant's good faith and that the overdraft was not a wilful abstraction.<sup>9d</sup> But an overdraft by an officer may amount to a misapplication.<sup>9d'</sup>

Under U. S. Rev. Sts. § 5209, there may be a conviction for aiding and abetting the misapplication of funds without the proof

<sup>80</sup> To the effect that intent may be inferred, see *United States v. Wilson*, 176 Fed. 806 (1910); *Morse v. United States*, 174 Fed. 539 (1909); *United States v. Breese*, 131 Fed. 915 (1909); *Chadwick v. United States*, 141 Fed. 225 (1905); *Pearce v. United States*, 192 Fed. 561 (1911); *United States v. German*, 115 Fed. 987 (1902).

<sup>8a</sup> *United States v. German*, 115 Fed. 987 (1902).

<sup>9</sup> *United States v. Fish*, 24 Fed. 585.

<sup>9a</sup> *Spurr v. United States*, 87 Fed. 701 (1898).

<sup>9b</sup> *Clement v. United States*, 149 Fed. 305 (1906).

<sup>9c</sup> *Gallot v. United States*, 87 Fed. 446 (1898).

<sup>9d</sup> *United States v. Steinman*, 172 Fed. 913 (1909).

<sup>9d'</sup> *Brook v. United States*, 149 Fed. 173 (1906).

A wilful abstraction differs from an official maladministration which may result in forfeiture of charter. *United States v. Steinman*, *supra*.

of a conspiracy, or conviction of the principal offender; but it must be shown that the misapplication was with criminal intent.<sup>96</sup>

The words "aids" and "abets" are to be construed according to their natural import; and when one accepts into his own hands from a clerk of a national bank money which one knows belonged to the bank, and used or pretended to use the same in gambling, one is guilty of aiding and abetting, and the fact that the officers of the bank might have known of some of the many overdrafts is no defence.<sup>97</sup>

Only those who are not connected with the bank can be aiders and abettors.<sup>98</sup>

Mere overdraft is not of itself criminal under U. S. Rev. Sts. § 5209, but if the party knew, or had good reason to believe, when he drew the checks in question that they or any of them were to be fraudulently paid by an officer of the bank, out of the funds of the bank, and not out of funds to which the drawer could legitimately resort, it is evidence of guilty intent necessary to convict.<sup>99</sup>

Where a cashier of a bank pledges to another bank certain bonds which have been pledged to the first bank for safe keeping and subject to immediate orders of the owner, such act renders the cashier guilty of larceny.<sup>100</sup>

Embezzlement by the cashier of a national bank is not a U. S. common law offence; it is punishable solely under the Rev. Sts. § 5209. The Pennsylvania acts of 1860, 1861, and 1878, relating to offences of bank officers, do not apply.<sup>101</sup>

A report of the condition of a national bank, made to the Comptroller of the Currency and verified by his oath, is a "declaration", within U. S. Rev. Sts. § 5392, as to perjury.<sup>11</sup>

<sup>96</sup> *United States v. Hillegass*, 176 Fed. 444 (1910).

To the effect that intent is a necessary element of the criminal offence see *United States v. Norton*, 188 Fed. 256 (1911); *Richardson v. United States*, 181 Fed. 1 (1910); *Prettyman v. United States*, 180 Fed. 30 (1910); *United States v. Wilson*, 176 Fed. 806 (1910); *Walsh v. United States*, 174 Fed. 615 (1909); *United States v. Steinman*, 172 Fed. 913 (1909); *United States v. Breese*, 131 Fed. 915 (1909); *McKnight v. United States*, 115 Fed. 972 (1902); *United States v. Eastman*, 132 Fed. 551 (1904).

<sup>97</sup> *Keliher v. United States*, 193 Fed. 8 (1912).

<sup>98</sup> *Richardson v. United States*, 181 Fed. 1 (1910). But see *Kettenbach v. United States*, 202 Fed. 377 (1913), holding that officers and agents of a bank may be aiders and abettors of other officers.

<sup>99</sup> *United States v. Kinney*, 90 Fed. 257 (1898).

<sup>99</sup> *Truslow v. State*, 95 Tenn. 196, 31 S. W. 987.

<sup>10</sup> *Commonwealth v. Ketner*, 92 Pa. St. 372.

<sup>11</sup> *United States v. Bartow*, 20 Blatchf. 351.

In an indictment charging a president of a national bank with making a false report under U. S. Rev. Sts. § 5209, the falsity of the report constitutes the gist of the offence and if it was made with intent to deceive a bank examiner the offence is complete and an erroneous statement of the amount of reserve in the bank is immaterial.<sup>11a</sup>

A purchase of stock in violation of U. S. Rev. Sts. § 5201, if made with intent to defraud, and by an officer of the bank named in § 5209, is not punishable under § 5209.<sup>12</sup>

On same facts (between same parties) as to conspiracy, under § 5440, compare *United States v. Britton*, 108 U. S. 192, 199, 27 L. ed. 703, 2 Sup. Ct. 525. It is not conspiring to commit an offence against the United States, if the president and a director conjointly cause shares of the bank to be bought with its money and held on trust for its benefit.

A director of a national bank, who, knowing that he has no money to his credit in the bank, and no right to draw money therefrom, obtains money from the bank to which he has no right, by means of an overdraft, made with intent to defraud, and converts the same to his own use, in fraud of the bank, is guilty of a misapplication of the funds of the bank.<sup>13</sup>

McMillan, to secure a loan from a national bank, delivered to it the certificate of his shares of its capital stock, which, on his failure to pay, the bank sold at its full market value, and credited him with the entire proceeds. *Held*, that his administrator could not maintain an action against the bank to recover the proceeds. U. S. Rev. Sts. § 5201, prohibiting such loan, imposes no penalty.<sup>14</sup>

Where A. is charged with making a false entry in the books of a bank in the account of "J. L. S.", proof that the entry was made in the account of J. L. S., as township treasurer, is a variance.<sup>15</sup>

A State statute making it a felony for an officer of a bank to receive deposits, knowing the bank to be insolvent, applies to

<sup>11a</sup> *Clement v. United States*, 149 Fed. 305 (1906).

<sup>12</sup> *United States v. Britton*, 107 U. S. 655, 27 L. ed. 520, 2 Sup. Ct. 512; compare *United States v. Britton*, 108 U. S. 193, 27 L. ed. 703, 2 Sup. Ct. 525.

<sup>13</sup> *United States v. Warner*, 26 Fed. 616.

<sup>14</sup> *First National Bank of Xenia v. Stewart*, 107 U. S. 676, 27 L. ed. 592, 2 Sup. Ct. 778.

<sup>15</sup> *Williams v. State*, 51 Neb. 630, 71 N. W. 313.

officers of national banks, and is not void as an attempt to control and regulate the business operations of national banks.<sup>16</sup>

"Embezzlement, abstraction, and wilful misappropriation<sup>16a</sup> of funds" constitute three offences, which may, however, be joined in one indictment under separate counts.<sup>17</sup>

An indictment charging a false entry with intent to injure and defraud and also charging a false entry with intent to deceive charges two distinct offences.<sup>17a</sup>

The charge of wilful misapplication of funds by officers of the bank and a charge that the defendants aided and abetted therein may be charged in a single count.<sup>17b</sup>

Where, in order to deceive the bank examiner, a special deposit is mingled with the bank funds, the entry of such deposit as money deposited is a false entry.<sup>18</sup>

Entries in the bank books showing loans on security of stock to persons named when in fact the transactions were purchases by the bank of its stock, are false entries.<sup>19</sup>

An entry which is intentionally made to represent what is not true is a false entry, and officers of a bank may be convicted when they make a sham entry with intent to deceive, even though the entry might nominally belong to the transaction but cannot in reality do so.<sup>20</sup>

But the entry must of itself be false.<sup>20a</sup>

Upon an indictment against an officer for making a false entry it is immaterial whether he make the entry personally or by a clerk,<sup>21</sup> and if done by another it is not necessary to charge by

<sup>16</sup> *State v. Fields*, 98 Iowa 748, 62 N. W. 653.

<sup>16a</sup> If the officer of the bank obtains the funds of the bank on the security of unmarketable bonds of his own enterprise at the risk of the interest of the bank there is a misappropriation. *Walsh v. United States*, 174 Fed. 615 (1909); but it seems that if the transaction is for the benefit of the bank there is no misappropriation. *Adler v. United States*, 182 Fed. 464 (1910).

<sup>17</sup> *United States v. Cadwallader*, 59 Fed. 677.

<sup>17a</sup> *United States v. Norton*, 188 Fed. 256 (1911).

<sup>17b</sup> *Prettyman v. United States*, 180 Fed. 30 (1910).

<sup>18</sup> *United States v. Peters*, 87 Fed. 984 (1898).

<sup>19</sup> *Morse v. United States*, 174 Fed. 539 (1909).

<sup>20</sup> *Billingsley v. United States*, 178 Fed. 653 (1910); *United States v. Wilson*, 176 Fed. 806 (1910).

<sup>20a</sup> *Hayes v. United States*, 169 Fed. 101 (1910); *Twining v. United States*, 141 Fed. 41 (1905); *United States v. Young*, 128 Fed. 111 (1904). But see *Morse v. United States*, 174 Fed. 539 (1909).

<sup>21</sup> *Morse v. United States*, 174 Fed. 539 (1909); *United States v. Wilson*, 176 Fed. 806 (1910); *Richardson v. United States*, 181 Fed. 1 (1910).

whom it was done.<sup>22</sup> If the intent is to deceive the bank examiners there may be a conviction.<sup>22</sup>

A false entry may be made with intention to injure and defraud the bank even though it represents the condition of the bank to be more favorable than it actually is.<sup>23</sup>

If an officer of a bank procures a note to be given to it by an irresponsible person with the intent of only apparently magnifying the assets of the bank, and should include such note as a *bona fide* asset in his report to the Comptroller there would be a false entry.<sup>24</sup>

To sustain a conviction for making a false entry it is not necessary that the officer direct the specific entry to be made or make it himself, but he may be found guilty upon a previous agreement between the clerk who makes the entry and the officer who instigated it.<sup>25</sup>

False entries are untrue statements of items of account by written words, figures or marks made therein.<sup>25a</sup> Only one who makes them or causes them to be made can be guilty, and one is not guilty of making a false entry by ratifying an association's report which contains a false entry,<sup>26</sup> nor can an officer be indicted for making a false entry when he fails to fill the blank space in the form furnished him by the Comptroller.<sup>26</sup>

A president of a bank cannot be indicted simply because he conceals facts from the bookkeeper by reason of which the latter makes the false entry.<sup>27</sup>

If officers of the bank make or cause to be made false entries they are liable as principals.<sup>28</sup>

The mere crediting of a depositor's account with certain fictitious checks does not amount to a misapplication of the funds of the bank. It is necessary that some portion of the funds be withdrawn from the possession or control of the bank.<sup>29</sup>

<sup>22</sup> *Richardson v. United States*, 181 Fed. 1 (1910).

<sup>23</sup> *Ibid.* See *United States v. Corbett*, 215 U. S. 233, 54 L. ed. 173, 30 Sup. Ct. 81 (1909).

<sup>24</sup> *Hayes v. United States*, 169 Fed. 101 (1909).

<sup>25</sup> *Kettenbach v. United States*, 202 Fed. 377 (1913).

<sup>25a</sup> *United States v. Herrig*, 204 Fed. 124 (1913); *Richardson v. United States*, 181 Fed. 1 (1910); *United States v. Wilson*, 176 Fed. 806 (1910); *Morse v. United States*, 174 Fed. 539 (1909).

<sup>26</sup> *United States v. Herrig*, 204 Fed. 124 (1913); *Morse v. United States*, 174 Fed. 539 (1909).

<sup>27</sup> *United States v. McClarty*, 191 Fed. 523 (1911).

<sup>28</sup> *Richardson v. United States*, 181 Fed. 1 (1910).

<sup>29</sup> *Dow v. United States*, 82 Fed. 904 (1897); *United States v. Martindale*, 146 Fed. 280 (1903).



The renewal of a note upon which nothing is actually obtained will not support an indictment for misappropriation, nor will the giving of a note secured by collateral for an overdraft support such indictment when the transaction was for the benefit of the bank.<sup>30</sup>

In an indictment charging a cashier with the wilful misapplication of funds by discounting worthless and unsecured notes for his own use, the only necessary intent to be proved is that he did the acts purposely or designedly, and that he believed himself solvent or insolvent, or the general reputation of the maker of the note is immaterial.<sup>31</sup>

When an officer of a national bank promotes various enterprises to obtain the funds of the bank on the security of unmarketable bonds of an enterprise of which he is the promoter, there is a misapplication of funds.<sup>32</sup>

When a cashier of a national bank obtains payment of a check as cashier and converts the proceeds to his own use the act is a wilful misapplication and abstraction of the funds of the bank.<sup>33</sup>

If a president of a bank discounts with the funds of the bank commercial paper known to him to be worthless or fictitious for the benefit of an insolvent corporation of which he is an officer with intent to injure and defraud the bank he is guilty of a wilful misapplication of the funds of the bank, and it is not necessary to allege in the indictment that he had no authority from the directors for doing so.<sup>34</sup>

An indictment which alleges that a cashier of a national bank wrongfully converted certain "moneys, funds, credit and credits" to the use of Dickinson sufficiently alleges the method of the misapplication.<sup>35</sup>

To sustain an indictment for wilful misapplication the misapplication must have been made with intent to injure and defraud the bank.<sup>36</sup>

An indictment for wilful misapplication must set forth facts showing a conversion; and a general allegation of wrongful intent without facts is bad.<sup>37</sup>

<sup>30</sup> *Alder v. United States*, 182 Fed. 464 (1910).

<sup>31</sup> *Pease v. United States*, 192 Fed. 561 (1912).

<sup>32</sup> *Walsh v. United States*, 174 Fed. 615 (1909).

<sup>33</sup> *Geiger v. United States*, 162 Fed. 844 (1908).

<sup>34</sup> *Flickinger v. United States*, 150 Fed. 1 (1906).

<sup>35</sup> *Dickinson v. United States*, 159 Fed. 801 (1908).

<sup>36</sup> *Prettyman v. United States*, 180 Fed. 30 (1910).

<sup>37</sup> *United States v. Heinze*, 183 Fed. 907 (1909); *id.*, 218 U. S. 532, 54 L. ed. 1139, 31 Sup. Ct. 98 (1910).

An indictment cannot be supported by charging an overdraft without charging that it was likely or probable that the bank would be injured or defrauded thereby.<sup>38</sup>

§ 263. **Executors, Trustees, etc. Liability.**<sup>0</sup>—Section 5152 U. S. Rev. Sts. cannot be held to give a right to enforce the liability of a trust estate by an action at law against one in the capacity of a trustee.<sup>1</sup>

If liability attaches while the assets are in the hands of a trustee the statute of limitations, regulating the time in which claims against an estate may be presented, has no application.<sup>2</sup> And where the trustee has distributed the estate to devisees, leaving claims unpaid, each devisee, who has received more than the amount of the entire assessment, is liable therefor.<sup>2</sup>

When the executors transfer stock to themselves as trustees neither the estate in the hands of the executors nor the legatees of the estate are liable for assessment even though the transfer is voidable but not void.<sup>3</sup> But if the beneficiary, after the nature of the transaction is brought to his attention, accepts it, or loses his right by laches or acquiescence to reject it, he will be liable.<sup>3</sup>

The trustee is not personally liable even though the trust estate is all consumed as a result of the insolvency.<sup>4</sup>

The receiver is not required to establish his claim before the register of wills, having jurisdiction over the settlement of decedent's estates to make demand upon the executors for payment or to present to them an affidavit as required by law of the state, before suing to enforce the liability of the estate of a deceased stockholder, and if the estate has been fully distributed a recovery may be had against the executors for their wrongful distribution.<sup>5</sup>

Married women are not exempt and so are liable, in the absence of a state law prohibiting them from owning stock.<sup>6</sup>

Section 5152 U. S. Rev. Sts. is not confined to express trusts,

<sup>38</sup> *United States v. Norton*, 188 Fed. 256 (1911).

<sup>0</sup> § 263. See *Rankin v. Fidelity Ins. Co.*, 189 U. S. 242, 47 L. ed. 792, 23 Sup. Ct. 553 (1902).

<sup>1</sup> *Hampton v. Foster*, 127 Fed. 468 (1904).

<sup>2</sup> *Mortimer v. Potter*, 213 Ill. 178, 72 N. E. 817 (1904).

<sup>3</sup> *Williams v. Cobb*, 219 Fed. 663 (1914).

<sup>4</sup> *Fowler v. Gowing*, 152 Fed. 801 (1907).

<sup>5</sup> *Rankin v. Miller*, 207 Fed. 602 (1913).

<sup>6</sup> *Christopher v. Norvell*, 201 U. S. 216, 50 L. ed. 732, 26 Sup. Ct. 502 (1906), affirming 134 Fed. 842 (1905).

and a father who purchases stock with the money of his children and takes it in his own name as trustee is not liable.<sup>7</sup>

Where a guardian, as such, owns stock in a national bank, he is not subject to any personal liability as a stockholder, nor is his ward so subject, but only the estate of the ward in his hands.<sup>8</sup>

§ 300. **United States Collector's Right to inspect Checks.**<sup>1</sup>—Section 3177 of the U. S. Rev. Sts. authorizes a collector, deputy collector, or inspector of internal revenue, to enter buildings where any article or objects subject to taxation are made, produced, and kept, so far as may be necessary for examining such articles and objects. It has been held that paid bank checks, properly stamped at the time when they were made, signed, and issued, are not articles or objects subject to taxation within the meaning of this statute, and the officials named have no privilege of entry into a banking-house for the purpose of examining such instruments.<sup>2</sup>

<sup>7</sup> *Fowler v. Gowing*, 152 Fed. 801 (1907).

<sup>8</sup> *Clark v. Ogelvie*, 11 Ky. 181, 63 S. W. 429 (1901).

<sup>1</sup> § 300. See § 80.

<sup>2</sup> *United States v. Mann* (United States Supreme Court), 17 Alb. Law Jour. 85. But, *contra*, see *United States v. Rhawn*, decided in U. S. Dist. Ct. East. Dist. Pa., 33 Legal Intelligencer, 258; *Thompson's National Bank Cas.* 358.



## INDEX

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[All references in the book are to Sections. Those to the part on National Banks are preceded by II.]

### A

#### ABANDONMENT,

of part of franchise, 67.

#### ABATEMENT,

of suit against insolvent bank, II. 250 c.

#### ACCEPTANCE,

though improperly made, may bind the bank, 98 l.

of checks. See CHECKS, 4.

payment of, by bank, 556.

#### ACCOMMODATION,

contracts of, cannot be made by cashier, 156, 158.

cannot be made by a bank, 65.

paper, *bona fide* holder for value of, can recover, despite the *ultra vires*, 745 a.

otherwise, if nothing of value has been relinquished, 748.

#### ACCOUNT,

kept by same individual in different rights, must be kept separate by bank, 326 a. See LIEN.

illegal items in a running, 291 f.

state of depositor's, not to be disclosed by bank (?), 294 a.

bank not obliged to balance, to prevent bar by limitation, 309 f.

bank held to know state of depositor's, 414, 571.

#### ACCOUNTING,

cannot be sought in equity on ordinary deposit account, 289 e.

#### ACKNOWLEDGMENT,

erroneously made by drawer of his signature on check, 468.

and filing of certificate of organization, II. 6 b.

#### ACT,

of 1864, called the National Banking Act, as revised, II. 1-63.

to forbid the further retirement of United States legal tender notes, II. 64.

authorizing conversion of gold banks into currency banks, II. 65.

concerning the verification of returns of national banks, II. 66.

**ACT**—Continued.

- to enable national banks to extend their corporate existence, II. 67.
- to reduce taxation by relieving bank capital, deposits, checks, drafts, etc., II. 80.
- to enable national banks to increase their capital, change their name or location, etc., II. 81.
- concerning jurisdiction of national banks, II. 82.
- concerning reserve and central reserve cities, II. 83.

**ACTION,**

- for debt due the bank, cashier may authorize, 159 *d*.
- by bank on paper held for collection, 246.
- on the common money counts by depositor, 289 *e*.
- by depositor for balance must be preceded by demand, 289 *e*.  
except in certain cases of waiver, 322.
- on certificate of deposit, demand must precede (?), 302.
- on behalf of principal against sub-agents in collection, 250, 251.
- by whom may be brought against collecting bank for default in process of collection, 220, 249–251.
- against drawer of check, previous demand on the drawee necessary, unless excused, 425.
- against bank by drawer for refusal to honor check, 458, 459.
- against bank by true owner of check paid by the bank on forged indorsement, 474.
- on bank bills, whether demand is necessary, 644, 645.
- against shareholder to enforce personal liability, 692, 696, II. 52.
- by shareholder, for his part of surplus, 706.  
for dividends, 708, 716.
- against directors for malfeasance, 717.
- for refusal to make transfer and give certificate of shares, 709, 714.
- arising under national banking laws, to be conducted by district attorney, II. 56.  
this provision directory, not imperative, II. 256.
- national bank may bring, in name of its predecessor, II. 244 *k*.
- by receiver, II. 50, 250; R. S. 5234.
- against receiver, II. 250 *a*.
- may be instituted against bank, after appointment of receiver, II. 250 *a*.
- abatement of, against insolvent bank, II. 250 *c*.

**ADDRESS,**

- of check, 367.

**ADMINISTRATOR,**

- checks drawn by, 438.

**ADMISSIONS.** See **DECLARATIONS.**

**ADVERSE CLAIM,**

- to deposit, payment in case of, 342.
- bank's duty in such cases, 342.
- bill of interpleader, 342.
- call for a change in the law to afford more complete protection to the bank in such predicaments, 342.
- the true owner may recover from bank, 342.  
even after a creditor of the depositor has served the bank with garnishee, 342 *a*.

ADVERSE CLAIM — Continued.

the true owner may recover from bank — Continued.

even after depositor has sued and recovered judgment, 342, n, 343.

but the bank must not take it upon itself to pay a true owner known to it to be such only after the service, 342 b.

unknown to bank at time of a payment does not affect it, 344.

ADVERSE INTEREST,

of an officer as affecting contracts with the bank, 99, 125 a, 125 b, 127 e, 136, 167 e.

of an officer as affecting the question whether notice to the officer is notice to the bank, 106.

AGENCY,

in another State, bank may have, for ordinary business, such as an individual could do, 46 b.

for deposit, not lawful, 46 e.

for issue, redemption, etc. of bills, 46 d, 666.

for collection, 267.

AGENT. See OFFICER.

checks drawn by, 433.

authority of, to draw post-dated check, 389 d.

a bank transmitting a deposit acts as, 567 c.

effect of the addition "agent," 604. See SIGNATURE.

sub-agent for collection. See COLLECTION.

liability for improper selection of, 235, 236.

bank may do ordinary business in another State through, 46.

examination of bank by special, II. 47.

bank does not become an, of the United States by deposit of public money, II. 245.

ALIENATION,

of bank's property, 62.

ALTERATION. See CHECK, 8.

AMBIGUITY,

whether latent or patent, decided by *lex fori*, 12.

APPOINTMENT,

of officers, 16.

of Comptroller, II. 1 b.

of receiver, II. 50, 250 A.

of occasional examiners, II. 54.

APPRAISEMENT,

of bank shares for taxation, II. 241.

APPROPRIATION,

of deposits, 327 c.

by bank to debt barred by Statute of Limitations, 327 d.

to pay note held by it. See PAYMENT, 2; also 323, 556.

of payments made by the bank,

first sum drawn applies to first sum deposited, except that depositor is presumed to draw his own money in preference to trust money mixed with it, 355.

## INDEX

### ARTICLES OF ASSOCIATION, II. 5, 8.

- in the nature of charter, 6, n. 1.
- may provide for lien on stock, except in case of national banks, 698 A.
- amendment of, requires two-thirds vote of stockholders, II. 68.

### ASSESSMENTS,

- on stockholders for redemption of outstanding notes, etc., II. 74.
  - may be levied by Comptroller, II. 213 c.
- on shares for taxation. See TAXATION.
- duty of bank as to, when it holds shares of its own stock as collateral, 716.

### ASSETS,

- a claim of the bank against an officer for dishonesty, etc. is, in the hands of a receiver or a succeeding bank, 129, 717 c, II. 244 i.
- special deposits form no part of bank's, 205.
- shareholder's right to surplus, 706.
- fraudulent increase of, 761.
- of national bank not liable to taxation, II. 241.
  - receiver's duty to collect, II. 250 a.
  - distribution of, of insolvent bank, II. 250 c.

### ASSIGNEE'S,

- checks, payment of, 437.

### ASSIGNMENT,

- check as an. See CHECK, 9.
- of bank-book, with notice to bank holds against subsequent attachment, 604 e.

### ATTACHMENT. See II. 252, 257 a.

- of deposit,
  - what funds affected, 346, II. 257 a.
  - payment of checks after service, 346.
  - is good, though served after certification of check still in the hands of the drawer, 417.
  - must be served before certification, after issue is completed by delivery, in order to hold funds covered by the check, 346.
  - made by B. for A. cannot avail to a creditor of A. until the bank has bound itself to pay A., 605.
  - gives way to previous assignment of bank-book with notice to bank, 604 e.
- of proceeds of collection,
  - in the hands of a sub-agent, 346.
- equitable right not subject to, by trustee process, 346 A.
- creditor serving, is in no better position than the debtor, 346 A.
- of shares,
  - gives way to prior unrecorded transfer (?), 710-713.
  - national bank may attach shares of its stock held by its debtor, II. 257 a.
- of national bank property,
  - in State courts, II. 257 a.
  - cannot be issued if bank is insolvent, II. 257 a.
  - receiver may move to set aside, II. 257 a.
  - cannot issue till after final judgment, II. 257 a.
  - in another State, may be issued by State court, II. 257 a.



AUTHORITY,

- of agent,
  - to draw post-dated checks, 389 *d.*
  - is presumed in favor of innocent third parties dealing with the agent according to established usage, though the officer's powers are in fact limited by the directors or by the (charter?), 98 *f.*
- of bank. See POWER.
  - to begin business, Comptroller's certificate, II. 12 *c*, 212 *c.*
  - to collect paper, continuance of, 216.
- of cashier,
  - inherent, 153 *et seq.*
  - to draw checks on the bank's funds, 154.
  - to certify checks, 155.
  - to buy and sell bills of exchange, 156.
  - to control bank's personalty, and dispose of it, 157.
  - to indorse the bank's negotiable paper, 158.
  - to collect debts due the bank, 159.
  - to discharge a mortgage, 159 *a.*
  - to indorse notes for collecting, 159 *b.*
  - to order protest, 159 *c.*
  - to authorize suit for a debt, 159 *d.*
  - to borrow money in bank's name, and give security or pledge, 160.
  - to borrow on time, 160 *a.*
  - to receive deposits, 161.
  - to attend to correspondence of bank, 162.
  - to attend to transfer of shares, 163.
  - to buy government bonds, 164.
  - to decide in regard to *bona fide* third parties, 171 *d.*
  - special, 165.
    - by organic law, usage, etc., 165 *c*, *d.*
    - to do acts requiring discretion, 165 *a.*
  - none, 169.
- of cashier's substitute, 175.
- of directors,
  - to manage bank's affairs, 116.
  - to allow discounts, 117.
  - to authorize cashier to allow discounts, 117.
  - to release a debt due the bank, 119.
  - to pledge or assign property of bank, 120.
  - to issue bank bills, 121.
  - to arrange with other banks for collecting, redeeming bills, etc., 122.
  - to remove the president or other officer, 123.
  - exists in them as a board, not as individuals, 124, 132.
  - does not extend
    - to working any organic change, 127.
    - to increase capital, 127.
    - to making contract in which they have an interest adverse to bank, 125.
    - to make profit for themselves by their trust, 125.
    - to giving away the bank's property, 127.
    - to making the bank an accommodation indorser or surety in any case wherein it has no interest, 127.
    - to delegation of discretion in important matters, 116.

**AUTHORITY** — Continued.

- of president,
  - to control bank's litigation, 143.
    - to enter a *remittitur*, 143 *d.*
  - to give receipt for securities, 144 *f.*
  - to agree on place of payment, 144 *g.*
  - to bind the bank by contract, express or implied, 144 *a, c, d, m.*
  - to certify checks, 155 *d, 413.*
  - does not extend, by virtue of his office,
    - to drawing checks against the bank's funds, 144 *b.*
    - to indorsing bank's paper, 144 *j.*
    - to control the bank's finances, 144 *b.*
    - to settle difficulties with creditors, 144 *b.*
      - or release a claim, 144 *c, h.*
    - to dispose of or control bank's property, 144 *b.*
    - to certify his own check, 144 *i.*
    - to stay execution, 144 *c.*
  - cases not so sweeping in their denial of presidential authority, 144 *k.*
    - by statute, 144 *l.*
- of teller, 174 *a.*
- to certify checks, 155 *d, 413.*

**B**

**BAILMENT,**

- liability of bank in cases of. See **DEPOSIT.**
- of bank bills as collateral, 638, 663.

**BANK.** See also **NATIONAL BANK.**

- definition of, 2-5.
- creation of corporation, 12 *A, 14, n., 16.*
- proof of existence, 14 *a.*
- continuance of existence 14 *a.*
- extension of existence, 14 *a, n.*
- ancillary powers of, 15.
- business powers of, 47 *et seq.* See **POWERS.**
- when may begin business, 45, II. 12 *c, 212 c.*
- where may do business, 46.
- is bound
  - by the acts of its officers. See **CASHIER, PRESIDENT, DIRECTORS.**
  - by action of the board of directors, 124.
  - by cashier's signature, 154 *a, c.*
    - not the form, but the substantial facts of the case, determine the bank's liability, 154 *c.*
  - by knowledge of officers, 104.
    - of directors, 133.
    - of president, 146.
    - of cashier, 166.
  - by representations of officers, 103,
    - of president, 145.
    - of cashier, 167.
  - by implications and inferences arising from conduct of cashier, 171 *i.*

**BANK** — Continued.

is bound — Continued.

by contract of officer.

made in cashier's name, 170.

is liable

for special deposits lost through negligence, 194.

for collaterals, 211.

for wrongful or irregular acts of officers or agent, 79, 89, 94, 95, 97, 98, 102, 126, 132, 171, 195 *a*, *b*, 199.

for accommodation indorsement unlawfully made, 98 *l*.

for acceptance unlawfully made, 156.

for loan made to it in fact, though not in form, 95, 144 *e*, 170.

for libel in corporate reports, 132 *a*.

for default of sub-agent, etc. in collection. See **COLLECTION**.

to suit by true owner of a deposit made by another, 341.

as garnishee of nominal depositor, 342.

to suit by drawer for dishonor of check, 458, 459.

to shareholder. See **ACTION**.

is held to know the state of a depositor's account, 571.

relations of, to depositor. See **DEPOSIT**.

must not disclose state of depositor's account (?), 294.

duty in regard to checks. See **CHECKS**.

duty in regard to payment of notes and acceptances, 556–558.

may adopt act wrongfully done away from bank, 168 *g*.

property of, may be pledged by directors, 120.

has lien on funds of depositor. See **LIEN**, **SET-OFF**.

as owner of shares in its own capital stock, 716.

duties of, holding shares of its own stock as collateral, as to dividend and assessments, 716.

organized under State law, reorganized as a national bank, II. 44, 62, 65, 244.

of the State, so called, 718.

suits against, 718.

issuing circulating bills, 664.

**BANKS OF ISSUE**,

do not include savings banks nor banks of deposit, II. 230.

**BANK BILLS**,

See **NATIONAL BANKS**, and see 69 *p-u*.

issue,

power to, not inherent, 53, 634.

an exclusive function of directors, 121, and their duty, 125.

constitutionality of, by State banks, 664.

restrictions on, of notes of other banks or States, 666, II. 39.

distinction in favor of such bills received on general deposit and afterward issued by the depository bank, 666.

limit of, of notes under five dollars, II. 22 *b*.

special deposit not a basis for, 666.

bank cannot, in another State, 46 *d*.

gold notes, authority to, II. 24 *b*.

over-issue of, liability of directors for, 128 *c*.

definition of, 635, 636.

are promissory notes, 635.

intended to circulate as money, 635.

BANK BILLS—Continued.

definition of — Continued.

must be payable on demand, 636.

non-essentials, 635.

post-notes, 636.

have grace, 636.

are otherwise governed by the law of bank bills, 636.

as legal tender,

no State legislation can make them legal tender except as to the issuing bank and in payment of State taxes, 637.

good tender unless objected to on that ground, 637.

not tender even against the bank, under statute, if obtained after the insolvency of the bank, 637 *c*.

North Carolina *contra*, 637 *c*.

justice seems against North Carolina, 637 *d*.

notes of a State bank must be received for debts by its successor, II. 244 *f*.

for what demands national notes are to be received, II. 23 *a*.

as collateral, 638, 663.

complete loss of,

bank is entitled to indemnity, since it may have to pay a subsequent *bona fide* holder, 649.

the true owner is entitled to the money subject to this contingency, 649 *A*.

some courts allow recovery on giving bond, 649 *A*.

others regard a bond as not satisfactory in a case of so great and interminable risk, 649.

proposed solution of the problem to secure the rights of both parties, 649 *A*.

destruction of, complete, 648, II. 42 *f*.

last owner may recover on proof of, 648.

the bills must be specified by number, etc., 648.

bond of indemnity must be given, 648.

destruction or loss of, partial,

the remaining part not negotiable, 650.

Lord Ellenborough *contra*, 650, 651.

mutilation, change of number, etc., does not vitiate, if the bills can still be identified as genuine bills issued by bank, 650 *a*.

national notes mutilated and worn, II. 24.

true owner may recover, 650.

usage as to recovery, 9, n. 9.

indemnity is required, 650.

*contra*, 650, n. 1.

notice by a bank that it will not pay on part of a bill, of no effect, 651.

forged,

do not constitute a good payment or deposit, 659.

but prompt notice must be given on discovery, 659.

and if the bills purport to be those of the receiving bank it is held to great diligence in examination, 659 *a*, 660.

change of numbers held to vitiate, 661.

*contra*, 650 *a*.

guaranteed by the State, 718.

**BANK BILLS — Continued.**

- holders of,
  - rights, 655-658, 719.
  - not preferred at common law, 655.
  - usually are by statute, 655, 719 (9).
  - rights against shareholders, 656.
  - officers, 657.
  - in case of bills stolen before completion, 658.
  - after completion, 658.
- national. See NATIONAL BANKS.
- note payable in, 642.
- penalty,
  - for issuing notes below a certain denomination, 666.
  - for issuing to unauthorized bank, II. 27.
  - for imitating, defacing, etc., II. 27.
- pledge of,
  - under agreement not to put them in circulation, does not give the pledgee the rights of a bill-holder, 663.
  - the identical bills must be returned, 663.
  - United States notes, unlawful, II. 39.
- presentment and demand,
  - not necessary before suit, 644.
  - (?) when payable at a particular place, 644.
  - advisable in case of insolvency to gain interest, 745.
- redemption of,
  - deposit of security for, 644, II. 16.
  - must be with reasonable despatch, 646.
  - artifices of bank to delay, condemned, 646.
  - bank may avail itself of the banking-hour limit, but not in an unreasonable manner, 647.
  - of national bank notes, II. 42 *e*.
  - place for, II. 32.
- restrictions on banks, powers in regard to, 69 *p-u*.
- set-off of,
  - if bank is solvent, possession of the bills before suit is sufficient, 640.
  - if bank is insolvent, possession before knowledge of the insolvency is requisite, 637, 641.
  - unless under explicit statute, or agreement, 641 *a*. See 637 *c, d*.
  - when knowledge of insolvency is presumed, 641 *b*.
- signatures,
  - cashier may countersign without adding his title, 158 *i*.
- Statute of Limitations,
  - does not run against until they cease to circulate as money, and be received and reissued by the bank, 643.
- title to,
  - passes by delivery, 652.
  - possession is *prima facie* evidence of, 652.
  - even in case of stolen bills, the burden is on the one who denies that the possessor is a *bona fide* holder for value, 652.
  - England *contra*, 652, n. 2.
  - a finder has good title against all but the original owner (the real loser), 654.

**BANK BILLS — Continued.**

title to — Continued.

and may recover them from B. with whom he deposited them, though he found them on B.'s premises, 654.

passes under a bequest of "money," etc., 654.

warranty of solvency,

express, 662.

implied warranty,

of continued solvency after transfer, none, 662.

of solvency up to the time of transfer,

best opinion that there is none, 662, 662 *b*.

*contra*, New York, etc., 662 *a*.

if the depositor knows the bank is insolvent, of course the payment is not good, 662.

warranty of solvency, implied,

if the receiving bank treats the bills not as a payment, but as a deposit for collection, it may cancel the credit if they are dishonored, 662 *d*.

**BANKING,**

right to conduct business of, 13.

at common law, 13.

courts cannot confer power to do business of, 14 n. 1 *a*.

regulation of, constitutional, 13, n.

restrictive laws, 13.

their purpose, 13.

cannot prohibit, 13, n.

apply only to continuous exercise of banking functions, not to isolated acts, 13.

construed favorably to infringer, 13.

penalty for violating limited to the one provided in the statute, 13.

equity will not interfere, 13.

supervision of, may be entrusted to bank examiner, 13 A.

nature of, business,

judicially noticed, 14 *a*, 45 *a*.

functions incidental to,

discounting, 50.

receiving on deposit the money of others, 48.

making collections, 52.

**BANKING COMMISSIONER,**

taking possession of insolvent bank by, effect of, 622 A, n.

**BANKING HOURS,**

judicially noticed, 45 *a*.

effect of, on third parties, 45 *a*.

on delivery by express company, 45 *a*.

presentment of check must be within, 431.

presentment of bills for redemption must be within, 646, 647.

but the bank cannot use the limit unreasonably, 647.

**BANKING LAWS. See ACT.**

**BANK NOTES. See BANK BILLS.**

**BANKRUPTCY.** See **INSOLVENCY.**

- does not vacate the office of director, 139.
- claim for excess of interest passes to assignee in, II. 230.
- national bank cannot be thrown into, II. 246.

**BEQUEST,**

- to bank, 55.
- of bank bills as "money", 654.
- of "all my debts" passes a general deposit, 606.
- of "cash" passes balance in bank, 606.

**BILL OF CREDIT,**

- definition of, 664, 665.

**BILL OF EXCHANGE,**

- cashier has charge of bank's dealings in, 156.
- may buy and sell, 156.
- whether he can accept, 156.
- cashier cannot accept for accommodation, 156.
- indorsing for collection is party to, 156.
- presented through banker, 231.
- whether instrument in form of check, but payable at a future day certain, is a, 362.
- national bank may buy, in another State, 156.
- what law governs, 12.
- liability of maker, drawer, etc., 12, n. 7.

**BONA FIDE HOLDER,** etc.

- what constitutes, 565, n. 1.
- New York and some other States do not regard one holding paper merely as collateral for a pre-existing debt as a, 591-599, 602.
- this view not approved, 600.

**BONDS.** See **NATIONAL BANKS.**

- official. See **OFFICIAL BONDS.**
- power of bank to deal in, 59, 60.
- cashier may buy government, 164.
- to save debt, 78.
- railroad, national bank may not sell on commission, 77 a.
- but may take to save debt, 77 b.
- United States, defined, II. 4.
- to be deposited as security for circulation, II. 16.
- exchange of, II. 16 c, 77.
- transfer of, II. 19.
- examination of registry and, II. 20.
- annual examination of, by banks, II. 25.
- interest on, and custody of, II. 26.
- reassignment of, II. 42 e.
- sale of, II. 48.
- not to exceed one quarter of capital, II. 74.
- three and one half per cent exchanged for three per cent registered, II. 77.
- exemption of municipal, from taxation under State laws does not affect national bank taxation, II. 241 y.
- of Comptroller, II. 1 c.

BOOKS. See DEPOSIT, (5).

- pass-book,
  - only shows state of funds, 619.
  - production of, in drawing deposit, 620 *b*.
  - loss of, 620 *d*.
  - gift of deposit by transfer of, 608.
  - assignment of, with notice to bank, holds against a subsequent attachment, 604 *e*.
- of the bank, inspection of, or inquiry concerning, by the depositor, 294.
- by check-holder, 294 *a*, 446, by partner, 294 *a*, *n.*, by stockholder, 294 *a.*, *n.*
- as evidence, 171 *i*, 295.
  - effect of entries in, 290, 291, 295.
  - only *prima facie* evidence, *ib.*
  - not conclusive as to title to deposit, 293.
  - must be verified by the cashier or clerk, 295 *a*.
  - in behalf of the bank, 292, 295.
  - against the bank, 171 *i*.
- Comptroller to examine, II. 3 *b*.

BORROWING,

- part of banking business, 48.
- on time, allowable when reasonably necessary, 63.
- a function of directors, but may be delegated, 116.
- cashier may borrow in bank's name, 160.
- on time, 160 *a*.

BRANCH BANKS,

- may be established only by statutory authority, 7 *n.*, 14 *n.*, 46.
- where may be lawfully established, 45, 666.

BURDEN OF PROOF,

- governed by *lex fori*, 12.

BUREAU,

- of Comptroller, established, II. 1 *a*.

BUSINESS,

- ordinary, may be done by a *de facto* company, 45.
- may be done in another State, 46.
- extraordinary or privileged, requires a *de jure* company, 45.
- when and where bank may do, 45, 46, II. 8, 208.
- Comptroller's certificate of authority to begin, II. 12 *c*.
- continuing, after default, II. 46, 246, 252.
- continuous seat of, supplies the law for obligations arising from the, 12 (7).
- of banking, consists of, etc., 46 *A*, 47, *n.* 5, 48.
- is for the accommodation of the public, 47 *b*.
- judicially noticed, 14 *a*, 45 *a*.

BY-LAWS,

- power to make, inherent, 43.
- extent of power, 43.
- effect of, 43.
- as to members of the corporation, 43.
- as to strangers, 9, *n.* 8, 43.
- enforcement of, 43.



## INDEX

### BY-LAWS — Continued.

- invalid, 43, n. 7, 8, 9.
- establishing a lien on stock, 698.
- of savings banks, 620.
  - part of contract with depositor, 620 *a*.
  - payment contrary to, 620 *e*.
  - as to production of pass-book, 620 *b*.
  - amendment of, 620.

## C

### CANCELLATION,

- usage to disregard, in printed part of check, 9, n. 9.

### CAPACITY,

- to contract, what law governs, 12 (5).
- directors must show reasonable, 125.

### CAPITAL,

- amount of, 14, II. 12-15, 81, 83 F.
  - restrictions on, 69 *v*.
  - increase in, 14, II. 13 *a*, 81, 213 *a*, *b*, *c*.
    - directors have no power to produce, 127.
    - circulation cannot be used to produce, II. 37.
  - reduction of, II. 213 *d*.
    - bank may not withdraw, II. 38 *a*.
- payment of, 14, II. 14.
  - of deficiency in, II. 38 *b*.
- surplus, may be used by bank in outside investment, 61.
- forfeiture may follow withdrawal of, or failure to pay, 761.
- taxation of, II. 241.
  - "other moneyed" refers to other taxable capital, II. 241.
  - "other moneyed capital", meaning of the phrase fully discussed, II. 241 *y*.

### CASHIER,

- appointment of, 12 A.
  - by directors *de facto*, 176.
  - after expiration of charter, 176.
- term of office, II. 208 *d*.
  - in relation to official bond, 27.
  - at pleasure of directors, II. 209.
- authority of, 151, 153-165.
  - limits of time and place to, 151, 168.
  - limits of inherent, 169.
  - powers, duties, and functions implied by title of office, 151, 153-164.
    - question of functions is for jury, 153, n. 1.
    - generally exceed those of the president, 153, n.
    - to discount and rediscount paper, 156, n.
    - to control and transfer corporate assets, 157, 158.
      - may lose this control, 159.
    - to transfer paper as collateral security for debt, 158 *g*, n.
    - to take collateral security for notes held by bank, 159, n.
    - to employ subordinates, 174.
      - his relation to them and their duties, 174.

CASHIER — Continued.

authority of — Continued.

- to collect debts owing to the bank, 159.
- and deliver up and discharge security, 159 *a*.
- in respect to litigation, 159 *d*.
- cannot sue on bank's bills, etc., in his own name, 169.
- to act as notary, 159 *c*.
- to compromise a debt owing the bank, 159 *e*.
- to sell stock taken as security for a loan, 159 *g*, *n*.
- to borrow money on behalf of bank, 160.
- to execute a bond to secure public funds, 161, *n*.
- to extend time of payment of negotiable paper, 171 *c*, *n*.
- but not, when it would release a surety, 169.
- to receive notes and make collections, 171 *c*, *n*.
- to draw on the funds of the bank, 171 *c*, *n*.
- to draw checks on behalf of bank, 154.
- none, to promise indemnity to sheriff, 169.
- none, to authorize attorney to assign claims, 159 *d*.
- none, to take anything but money in payment of non-negotiable note, 159 *f*, *n*.
- none, to pay his private obligations by accepting, as cashier, the note of another, 159 *f*, *n*. 12.
- none, to authorize an officer of another bank, to accept check in his own name, 155 *d*, *n*.
- none, to release an indorser, 159, *n*. 10.
- none, to promise maker of note that he will not be liable thereon, 167, *n*.
- none, to make a deed to himself, 169.
- none, to obligate bank as surety on replevin bond, 169.
- none, to mortgage property of bank, 169, *n*.
- none, to transfer assets of the bank, 169, *n*.
- none, to delegate his power to certify checks in his name, 169.
- none, to make false representations as to customer's solvency, 169.
- none, to release indorser or maker, 169.
- none, to release claim, 169.
- none, to indorse a note, 169.
- none, to make a deed to himself, 169.
- to countersign bills, notes, etc., 158 *i*.
- to attend to bank's correspondence, 162.
- to deal in exchange on behalf of bank, 156.
- to accept (?), 156.
- indorsing bill of exchange is a "party" to it, 158.
- to make contracts for bank,
- in his own name, 170.
- usage showing transfer to him to be to bank, 170, *n*. 2.
- by letter, 162.
- collateral contracts cannot be made by, 165.
- to indorse on behalf of bank,
- for collection, 158.
- for other purposes generally, 153, 165, 169.
- forms of indorsement, 153 *h*.
- indorsing per proc. under special power, 98 *h*.
- to pay overdraft (none), 357.
- to certify checks, 155.

## INDEX

### CASHIER — Continued.

#### authority of — Continued.

- to accept or refuse one desiring to be a depositor, 161.
- to receive payment or deposit away from bank, 168 *f*.
- to bind bank by declarations or admissions, 167.
  - by implications from his acts, 171 *i*.
  - by acts contravening charter, 171 *j*.
  - by certain transactions outside of his ordinary duties, 171 *g*.
- when acting as president, 165 *c*.
- derived from resolutions of directors, 165.
  - verbal instructions, 165.
  - usage and tacit permission, 165.
  - necessity and implication, 165.
- presumptions as to, 165 *b*.
- estopped to deny his own authority, 176 *a*.
- to receive a note and make collections thereon, 171, *n*.
- to draw on funds of the bank, 171, *n*.
- notice to and knowledge of, 166, *n*.
- duty of, 151 and references.
  - to make transfer of shares, 163.
  - to see that dishonor of paper is properly given, 159, *n*. 4.
- liability of,
  - to bank, 172.
    - for his subordinates, 172.
    - directorial orders as a defense, 172 *b*.
    - for negligence in paying out money on unauthorized check, 172 *n*.
  - for allowing overdrafts, 172, *n*.
- as trustee, 173.
- dealing with bank in his own behalf, 173.
- loans to, 173.
- sales of land by, in official capacity, 173 *b*.
- embezzlement by, 173 *a*.
- temporary substitute, not clothed with all his powers, 175.

### CERTIFICATE,

- of organization,
  - conclusive against stockholders and creditors, II. 206 *a*.
  - fixes locality of bank, 46 *f*.
  - acknowledgment and recording of, 14, II. 6 *b*, 206 *a*, *b*.
- of authority to begin business, II. 12, 212 *c*.
- of shares,
  - purchaser of shares, entitled to demand, 709.
  - stipulations in, as to mode of transfer, 709.
- of deposit,
  - power of bank to issue, 51.
  - form, 297.
    - drawn to husband and wife, 308.
  - purpose, 297, *n*.
  - nature, 298.
  - negotiability, 299.
    - "in current funds", 299.
  - transfer, 300.
    - ownership without indorsement, 300.

## INDEX

### CERTIFICATE — Continued.

- of deposit — Continued.
  - Statute of Limitations, 302.
    - conflict, 302.
  - when stale, 303.
  - payment by, 304.
    - collecting bank taking its own, 305.
  - lost, bond of indemnity, 306.
  - interest on, 307, 309.

### CERTIFICATES,

- gold, issued in exchange for coin, II. 78.
- gold and silver, counted in the reserve, II. 78.

### CERTIFICATION. See CHECKS, 4.

### CHANGE,

- of usage, 9, n. 1.
- in circumstances, affects risk on official bonds, 28-32.
- of State bank into national bank, II. 244 *a*.
  - right of action belonging to former, becomes assets of the latter, II. 244 *i*.
- of location or name by national bank, II. 81.
- of deposit from one kind to another, 188.

### CHARTER,

- articles of association, equivalent to, 6, n. 1.
- State cannot alter or repeal, unless power is reserved, 6, n. 3.
- is the source and limit of bank's powers, 6, n. 4.
- judicial notice of, 14 *a*.
  - must be proved in certain suits, 14, n. 9.
- by-laws must not be contrary to, 43.
- how far presumed to be known to third parties, 98 *f*.
- acts in contravention of, 171 *j*. See *ULTRA VIRES*.
- regulations in, concerning signature of contracts, 744.
  - how construed, 743, 744.
- clauses in, concerning usury, 750.
- continuance of, 765.

### CHECKS,

- (1) In general,
  - description and elements, 363.
  - essentials *v.* formalities, 363.
  - if so unusual in form as to be suspicious, bank should inquire, 363 *b*.
    - distinction between refusal to pay and request for delay, 363 *c*.
  - essentials,
    - signature, 365.
      - additions, "Agent", etc., 365 *a*.
    - certainty of amount, 366.
    - address, 367.
    - date, 368, 368, n.
    - time of payment, 369.
    - designation of payee, 370.
      - if line is drawn through space left for payee it is void, 370.
    - words of ordering, 371.
  - surplusage, 372.

CHECKS — Continued.

(1) In general — Continued.

- presumed to be drawn against a deposit, 373.
- negotiability, 374.
  - "in current funds", 374.
- payable in another State, 375.
- in form checks, but not in substance, 376.
- grace, 377.
- contrast of, with bills of exchange, 362, 378-380.
- instruments payable at a future day certain, 381.
  - question as to whether they have grace,
    - the best view allows grace, 381 *a*.
    - Story *contra*, 381 *b*.
    - also Pennsylvania and Rhode Island, 383-385.
    - Ohio, Georgia, California, Missouri, Oregon, and New York allow grace, 383.
    - discussion of the question, 386.
    - evidence of usage, 387.
- memorandum checks,
  - presentment and notice waived by writing "memorandum", 388.
  - as between bank and payee, are ordinary checks, 388.
- ante-dated, 389.
- post-dated, 380, 389.
  - payment before date is bank's risk, 389 *a*.
  - money cannot be retained as against other checks with which to pay, 389, *n*.
  - are negotiable before date, 389 *c*.
  - agent's authority to draw, 389 *d*.
  - a deposit of, if certified, equivalent to deposit of money, 413, *n*.
  - effect of certifying before maturity, 413 *b*, *n*.
- may be drawn or indorsed away from bank, 168 *b*, *c*.
- must not be paid or certified away from bank, 168 *d*, *h*.
- issue of,
  - when a check is issued, 390.
  - conditional delivery, 390.
  - parol evidence, 390.
- indorsement of,
  - intent governs, 391.
  - when a mere receipt, 391.
  - by a lunatic, 392.
  - away from bank, good, 168 *c*.
  - cashier may indorse for bank in regular course of business, 158.
- payable to bearer, 393.
- money given to drawer of worthless, 394.
- transfer by mail,
  - title in sender during transit unless consignee authorized that mode of transmission, 395.
- collection of. See COLLECTION, 4.
- lost, 395 *A*.
  - equity may compel drawer to give new, 395 *A*.
  - if bank pays to a *bona fide* holder, loser has lost title, 395 *A*, *n*.
- conversion of, 395 *B*.

CHECKS — Continued.

(1) In general — Continued.

- stolen, 395 C.
- when bank not liable to owner, 395 C.
- not taxable after being paid, II. 300.
- United States collector no right to inspect such, II. 300.
- not now subject to United States tax at all, II. 80.

(2) Revocation of,

- by countermand, 397, 398.
- countermand not effectual until it has reached the bank, 398, n.
- countermand not effectual in South Carolina, if it has passed to a *bona fide* holder, 398, n.
- by death of drawer, 400. \*
- by insolvency of drawer, 400 A.
- power of, ceases when certification is complete by delivery of check marked good, 399.
- result of, 398, n.

(3) Statute of Limitations,

- runs only from demand, 402.
- but demand cannot be indefinitely delayed by keeping the check, 402 a.

(4) Acceptance and certification,

- cannot be claimed as a right, 404.
- no presentment for, is necessary, 404.
- form, 155 c, 405.
- usually the word "good" is written on the face, 406.
- verbal acceptance, 406-408, 413 c.
- not good if there are no funds, 408 a.
- except by estoppel, or by reason of new consideration, 408 A.
- some authority, that the Statute of Frauds does not apply to all to commercial securities, 408 A.
- statutes requiring acceptance to be in writing, 407.
- acceptance by telephone or telegraph, 406.
- marking "Paid" upon the check is no acceptance, 408 b, 411, n.
- promise of bank to pay, communicated to holder, 407 a.
- acceptance to pay at a future day, 408 c.
- acceptance by retention (?), 409.
- putting on cancelling fork, 410.
- charging the amount to the drawer, 410, 474 e, h.
- paying on forged indorsement (?), 474.
- delivery necessary to complete, 411.
- authority to certify, 413.
- cashier has inherent, 155, 413.
- president and teller probably have, 155 d, 413. See 174, n.
- authority to certify, restrictions on, 155 g.
- check must be in proper form, and not dated subsequent to certification, 413 a, b.
- nor given as collateral, 155 a.
- officer has no right to certify his own checks, 155 b.
- nor any check while away from bank, 168 d, h, 412.
- national bank has, 413 c.

CHECKS — Continued.

(4) Acceptance and certification — Continued.

wrongful, good as to innocent party, 155 *h*.

effect of,

valid in hands of a *bona fide* holder, 155 *i*, n. 18.

does not prevent signing, 413, n.

after issue, 414.

drawer discharged from liability to holder, 414 *b*, *c*, *d*, *e*, *f*,  
*g*, *h*, *l*.

drawer cannot sue bank for subsequent dishonor, *ib*.

warrants signature and funds, 414 *h*, 482.

but not the body of the check except in Louisiana, 414 *i*,  
482.

evidence of usage, 414 *i*.

bank must not, however, mislead an inquirer by neglect  
to give information in its reasonable reach and pos-  
session, 414 *j*.

equal to a certificate of deposit as against the bank, 414 *e*.

bank absolutely bound to holder, 414.

and must pay whether drawer had funds or not, 418.

creditor of drawer cannot attach the fund covered by the  
check after certificate is completed by delivery, 346.

before issue,

does not at once discharge drawer, 415.

nor make the bank unconditionally liable, 415.

attachment by creditor of drawer may intervene between  
certification and issue, 415, 417.

insolvency of bank may intervene, 415.

indorser having check certified is still liable to indorsee, 415.

Statute of Limitations runs from demand, 418.

by mistake, 419.

penalty for false, II. 55, 79, 259.

forged. See CHECKS, 8, below

alterations before and after, *ib*.

(5) Presentment for payment, and collection of checks,

condensed statement, 259.

period within which it must be made, 421.

must be in banking hours, 421, n., 431.

presentment of duplicate does not create or change liability, 422.

effect of delay,

as to drawer, 421.

as to indorser, 422.

reasonableness of delay is for the jury, 422, n.

excuse for delay, 423, 425.

clearing-house,

presentment through, is legal, 354.

has not as yet changed the period for, 424.

except in Maine, 424 *a*.

at some time, is necessary, before suit against drawer, 425.

unless excused, 425 *a*.

the first, fixes the rights of the drawer, 426.

by mail, 427, 236.

if bank sends money by mail it must register the package,  
427, n.

## INDEX

### CHECKS—Continued.

- (6) Notice of dishonor,
  - by one whose liability is fixed, enures to the benefit of all, 428.
  - time for, cannot be enlarged by taking check instead of cash, 428.
  - when residence is unknown, 428.
  - may be given by telephone, 428.
- (7) Payment of,
  - care should be taken that the signature corresponds with the books, 432.
  - away from bank not good, 168 *d*, *h*.
  - after service of attachment on the deposit, 346.
  - a mass of checks received through the clearing, when the funds are insufficient to pay all, 354.
  - whose check the bank shall pay,
    - additional titles "agent", "trustee", etc., 432.
    - agent's checks, 433.
    - "kiting" of checks, 433, *n*.
    - married woman's checks, 434.
    - joint checks, 435.
    - trustee's checks, 436.
    - assignee's checks, 437.
    - co-executor's checks, 438.
    - firm checks, 439.
      - forms of signature, 439 *c*.
      - surviving partner, 439 *d*.
      - check of one not known to bank as a partner, 439 *a*.
      - check in name of individual partner, 439.
      - bank may show that a deposit in partner's name is really firm's, 439 *b*.
      - dissolution of firm, 439 *e*.
      - partner of new firm formed by partner of old firm and a third person, 439.
  - corporation checks,
    - bank held to know corporate articles, 440.
    - treasurer's check, 440 *a*.
    - if bank knows that checks to treasurer's own order are being improperly used it pays at its peril, 440, *n*.
    - signature furnished the bank, 440 *b*.
    - non-countersigned checks, 440 *b*, *n*.
    - proper form of signature, 440 *c*.
    - cashier of bank has inherent power to draw, 154.
      - form that will bind, 154 *a*.
    - if funds really go to proper destination, the bank is discharged, 440 *c*.
    - successors in office command the deposit, 440 *A*.
  - wrong, by mistake or carelessness,
  - when any money paid goes to true destination, bank is not liable for wrong payment, 440 *B*.
    - or if the payment is ratified, 440 *B*, 471.
    - no presumption of mistake, 454.
    - recovery after more than six years, 454.
    - statute does not run when the cause of action is fraudulently concealed, in Massachusetts, 454.
    - over-payment, 454.



**CHECKS — Continued.**

**(7) Payment of — Continued.**

- payment to one of same name as customer, 454, n.
  - error as to sufficiency of funds, 455.
  - before date, is at bank's risk, 456.
  - when by mail, duty of, 456.
  - to wrong person, 457.
- stale checks, 441-443.
  - when not stale, 442.
  - age may put bank on inquiry, 443.
  - one year after day named for payment makes stale, 443.
- errors in writing checks, 444.
- suspicious circumstances,
  - check torn and pasted together, 445.
  - qualified refusal to pay, 445.
  - time should be taken for inquiry, 445.
  - usage to disregard cancellation of printed part, 9, n. 9.
- insufficient funds, 446, 294.
- not authorized to make part payment, 446, n.
- in what money payment is to be made,
  - legal tender, 447.
  - foreign coin, 447.
  - special agreement or waiver, 447.
- in forged paper or base coin, 448.
  - is no payment, and it is not necessary to raise the objection at the time of payment, 448.
- recalling of payments, 449.
- order of,
  - small check after a large one, refused for insufficiency of funds, 450.
  - a mass of checks coming together, 450 b.
- by credit, 451.
  - does not always bind bank, 451.
- after insolvency of bank, 452.
- refusal to pay,
  - drawer's right of action for, 458.
  - measure of damages, 458.
  - exemplary damages, when given, 458.
  - defenses of bank in such suit, 459.
    - insufficient funds, or only such as are too recently arrived to be available, etc., 459.
    - that check is written on form of another bank is no defense, 459.
    - when check is not drawn for the purpose of the special deposit, 459.
    - when condition for which money deposited has not been fulfilled, 459.
    - when check not presented in way ordered by drawer, 459.
- drawer has a right to possession of paid checks, unless they are unsettled overdrafts, 460.
- checks on other banks, 460 A.

**(8) Forgery of,**

- principles of the subject, 461.
- transfer of check warrants its genuineness, 477.

CHECKS—Continued.

(8) Forgery of — Continued.

- comparison of bills and checks, 462.
- signature of drawer forged,
  - questions between bank and persons receiving the money,
    - old rule, bank held to know drawer's signature, 463.
    - this rule unreasonable, 464.
  - better doctrine allows recovery unless the bank is alone in fault and the holder would be prejudiced by correction of the mistake, 466.
  - special circumstances,
    - paying bill for acceptor, 465.
    - unseen draft paid on representations, 465.
    - usage for bank to inquire as to genuineness of checks on another bank, 466 *b*.
    - when holder is negligent, 466 *d*.
    - when holder does not impart suspicious facts, 466 *f*.
    - when holder did not require proper identification of former party, 466 *g*.
    - Pennsylvania statutes, 466 *h*.
  - questions between bank and drawer,
    - old rule, drawer not held to any diligence in examining accounts, 467.
    - modern rule, drawer must exercise ordinary care himself or by an agent, in examination of accounts and vouchers, 472.
      - estoppel, Lord Campbell's statement, 472.
      - estoppel, some states opposed to doctrine of, 472, *n*.
      - should not knowingly withhold knowledge, 472, *n*.
      - should notify bank of strange handwriting, 472, *n*.
      - mere silence does not conclude drawer, 473.
      - immediate examination not necessary, 473.
      - no duty to investigate indorsement, 473, *n*.
      - if forgeries are discovered, notice must be given, 473, *n*.
      - unauthorized use of rubber stamp, 470 *A*.
    - when drawer pronounces his signature good, 468.
      - or issues paper with forgery on it, 468.
      - or consents to signature by another, 468, *n*.
      - or is in fault, 469.
      - or negligent in leaving check-book about, 470.
      - or ratifies a payment on forged signature, 471.
      - or ratifies proceedings, 471.
    - need take only reasonable care not to mislead, 469.
- forged indorsement,
  - bank *v.* the true owner,
    - payment on a forged indorsement is an acceptance, and the true owner may sue the bank, 474.
    - even where the last indorsement is genuine, 474 *a*.
    - United States Supreme Court, *contra*, 474 *f*.
    - quære when payment is to another of same name, 474 *c*.
    - not liable for payment to an imposter, 474, *n*.
  - bank *v.* drawer,
    - bank can only pay according to drawer's directions, no other payment can discharge the bank, unless through the drawer's fault or ratification, 474, 476 *a*.

CHECKS—Continued.

(8) Forgery of — Continued.

- drawer cannot throw on bank the burden of diligence he himself should bear, 474 *e*.
  - English statutes, 475.
  - bank *v.* the person receiving the money,
    - when the drawer has made himself liable, no recovery by bank, 476 *a*.
    - otherwise bank may recover at any time, though the holder has been prejudiced by delay in discovery, the parties being bound to equal diligence, 476 *b*.
    - special negligence causing damage would prevent recovery, 479.
  - forged certification,
    - adoption of, binds the bank, 478.
  - alteration after signature,
    - bank *v.* receiver of the money,
      - bank may in general recover, 479.
      - otherwise if the receiver is a collecting bank that has remitted to its principal before notice of the demand of the paying bank, 479.
    - negligence will not prevent recovery, if the holder has not been prejudiced, 479.
  - bank *v.* drawer,
    - bank's loss unless caused by drawer's negligence, 480.
  - bank *v.* purchaser of draft, 483.
  - alteration and certification,
    - check raised after certification,
      - the excess paid, may be recovered unless an innocent party would be prejudiced, 481.
      - or unless the bank has negligently left the door open for the fraud, 481 *d*.
    - check raised before certification,
      - certification warrants only the signature and funds, wherefore an excess paid may be recovered, 482, 414.
    - Louisiana *contra*, 482 *f*.
    - it is for the jury whether the bank is negligent in answering inquiries without the customary examination of the certification-book, etc., 482 *e*.
  - alterations,
    - in printed part of check, 484.
    - must be material, 485.
    - in date, are material unless made by a stranger, 485.
    - in figures, not material, 485.
    - erasing a name, and rewriting the same, held forgery, 485.
  - fraudulent filling up of checks signed in blank, 486.
  - notice of forgery,
    - time of, 487.
    - various rules, 488.
    - true rule, no length of time will bar recovery, 489.
    - but prompt notice must be given on discovery, 489.
    - even the United States is not exempt from this rule, 489 *e*.

CHECKS—Continued.

- (9) Effect of,
  - as a testamentary document, 554.
  - as evidence, 552.
    - between drawer and payee, 552.
    - between drawer and bank, 553.
  - as payment, 543.
    - presumed to be conditional only, 544.
    - may be absolute, by agreement, 546.
    - are always so far payment that the drawer cannot be garnished as debtor of the payee, 545.
    - laches of holder destroys the obligation of drawer on original debt, 546.
    - loss of check same effect, 546.
    - parol admissible to show that check was given as a loan, 547.
  - as a tender, 547 A.
  - as a gift,
    - inter vivos*, 549, 551.
    - donatio causa mortis*, 549, 550.
  - as an assignment,
    - discussion of the question, 492–510.
    - between bank and holder, 310, 430.
      - holder's action, 514, 403.
      - special circumstances,
- (1) Facts which give the holder a clear right to sue the drawee, 511.
  - check on designated fund, 511 *a*.
  - bank charging the drawer, 511 *b*.
  - words of transfer in check, 511 *c*.
  - certification, 511 *d*.
  - promise of bank to pay the check, communicated to holder before he took check, 511 *e*.
  - check for whole deposit, 511 *g*.
  - death of drawer, equity will relieve, 511 *h*.
  - when bank knows the money to belong to holder, though deposited in drawer's name, 511 *l*.
- (2) Facts making it clear that the holder has no right to sue drawee,
  - check not against funds, 511 *i*.
  - no deposit but unpaid drafts, 511 *j*.
  - no preference to general creditors in case of drawee's insolvency, 511 *k*.
  - bank paying out the deposit before notice of the check, 511 *f*.
  - cases denying holder's right to sue drawee, 513–527.
  - cases supporting the right, 528–538.
  - discussion of the question, 493–510.
  - between holder and creditors of drawee, 498.
  - between holder and drawer and his creditors, 539–541.
    - cases denying that a check is an assignment between drawer and holder, 513–527.
    - contra*, 539–541, also 528–538.
  - between one holder and another, 497.
  - when drawn in one State, payable in another, 542.

**CHECKS**—Continued.

- (10) Taken in payment by an agent, 252 *b*, 247 *c*. See **COLLECTION**, 6.
- (11) Title to. See Chapter XXXVI.

**CLAIMS**,

- bank's, against director, 129.
- bank may settle by compromise, 57.
- notice to present, II. 50 *b*.
- jurisdiction of Court of, II. 201 *d*.
- approved by Comptroller, bear interest, II. 250 *c*.
- for damages are on the same plane as other debts in case of insolvency, II. 250 *c*.

**CLEARING-HOUSE**,

- daily routine, 349.
- payment through, what is, 349, *n*.
- effect of rules, 350.
  - on non-members, 351.
    - customers of members cannot take advantage of, 351.
    - a member, as agent for non-member to do business through the, 351.
  - between members, 352.
- payment of notes through the, 353.
- insufficient funds to pay all checks against one depositor, coming in one mass through, 354.
- cannot retain debit items and apply credit items to payment of claims, 354.
- presentment of a check through, is a legal presentment, 354.
- has not changed the period for presentment except in Maine, 424.

**COIN**,

- when deposit in, is special, 184, 568 *b*.

**COLLATERAL**,

- check given as, not to be certified, 155 *a*.
- bank may hold other stocks than its own as, 77.
- liability of bank for loss of, 211, 212.
- United States notes not to be held as, II. 39.
- bank notes as, 638.
- duty of collecting bank concerning, 225.

**COLLECTION**,

- of debts due the bank is cashier's duty, 159.
- of void tax may be enjoined, II. 241, *o*, *x*.
- of paper, left with bank for that purpose, part of banking business, 52.
  - the collecting bank acts as agent, 214.
    - for whom, 214.
    - paper payable at the bank, 214.
      - revocable, 214, *n*.
  - consideration for collecting, 215.
  - continuance of authority to collect, 216.
  - title to such paper, 565, 591-596.
  - indorsement for collection,
    - effect of, 217.
    - destroys negotiability, is notice of ownership to all subsequent parties, 217.
    - cashier may indorse bank's paper for collection, 158, 159 *b*.
  - reasonable charges for, not usurious, 52.

COLLECTION — Continued.

of paper, left with bank for that purpose, part of banking business — Continued.

Duties of the collecting bank.

(1) General statement, 218, 219.

reasonable care and skill is contracted for by it, 218.

placard hung in bank may be evidence of terms of the contract, 218.

bank must act for its principal's best interest, and preserve the liability of all parties to him, 219.

adverse interest, 219.

what law and usage governs collection, 220.

instructions must be obeyed, 207, 208, 224.

must be forwarded, 224.

duty concerning collateral security, 225.

discretion of bank in doubtful cases, 226.

(2) Collections in locus of bank.

presentment of draft payable at future day, 227.

notary's duty, 228.

presentment for acceptance, 258.

for payment, 229, 259.

time for, 229, 240, 242, 245, 259.

place, 230, 259 *b*.

usage to send notice that paper is at the bank, instead of making presentment, 231.

protest, 227, 260

notice of dishonor, 261.

bank to notify its immediate principal, 232.

whether other parties, 232.

evidence of agreement to notify all, 232 *a*.

time of, 232 *b*.

manner of,

notice by mail good by usage, 233.

test of difference of place, 233 *a*.

waiver of demand and notice, 234.

excuse for failure, 232 *c*, 234 *a*, 262, 263.

(3) Collections not to be made in bank's locus, 235.

selection of sub-agent, 236.

the payor is not a suitable agent, 236 *a*.

duty to transmit customer's instructions, 224, 235.

(4) Collection of checks, 237.

distinction between duty of bank to customer and duties existing between other parties, 238.

illustrated, 239.

time of presentment, 239, 240, 244, 259.

forwarding, 241.

enlarged by crossing, 245.

rule varied by agreement, etc., 242.

bank liable for loss resulting from failure to follow usual course, 243.

(5) Suits by the collecting bank, 246.

(6) Proceeds of collection,

only money to be received, 9, n. 9, 247.

part payment cannot be received, 247, n.

## INDEX

### COLLECTION — Continued.

of paper, left with bank for that purpose, part of banking business — Continued.

mode of dealing may vary the rule, 9, n. 9, 247 *a*.

substituted note, 247 *b*.

taking check in payment,

preserving the liability of the parties, 247 *c*.

ratification by principal, 247 *c*.

English usage justifies, 252 *b*.

bank taking its own certificate of deposit in payment of collections, 305.

disposal of proceeds, 248.

depreciation of, 248.

insolvency revokes power of bank to credit on general account, 248 *a*.

proceeds of forged and raised paper held for real owner, 248 *b*.

attachment of, in hands of sub-agent, 346.

lien on. See LIEN.

Liabilities growing out of,

when first bank becomes customer's debtor, 249.

liabilities of the various banks to the owner directly, 250.

to the real party in interest, 251.

causes of liability, 252.

irregular acceptance, 252.

failure to protest, 252.

inquire, 252.

follow instructions, 252.

exercise due care in any way, 252.

mistake of fact, 255.

of law, 256.

liability for default of branch bank, 253.

when depositor is in fault, 254.

collection agency cases, 267.

liability for the negligence of notary,

much conflict on this point, 265.

bank must exercise due care in selecting, 266.

liability for negligence of correspondent,

question stated, 268.

special agreement, 269.

usage, 270.

bank everywhere held to due care in selecting, 271.

the general problem,

New York rule affirms the liability of first bank for, 272, 273.

what other courts hold the New York rule, 272.

Massachusetts rule denies the first bank's liability, 274.

where this rule prevails, 274.

grounds of the Massachusetts rule, 275.

discussion of the question, 276.

Cases affirming the liability,

Eng., 277; N. Y., 278; Ohio, 279; U. S., 280.

## INDEX

### COLLECTION — Continued.

of paper, left with bank for that purpose, part of banking business — Continued.

Cases denying the liability,

U. S., 281; N. Y., 282; Pa., 283; Iowa, 284; Miss., 285; Mass., 286; Conn., La., Ill., Wis., Md., Mo., 287.

### COMMISSIONER OF BANKING,

effect of taking possession of an insolvent bank by, 622 A, 622, A, n.

### COMPETENCY,

of witnesses governed by *lex fori*, 12.

of bank officers as witnesses, 113, 295.

of shareholders, 113 b.

### COMPROMISE,

directors may, a claim of the bank, 119.

cashier has no inherent power to, but usage may give him authority to, 159 e.

### COMPTROLLER OF CURRENCY, II. 1. See 201.

Bureau of, established, II. 1 a.

appointment and term, II. 1 b.

oath and bond, II. 1 c.

Deputy Comptroller, II. 1 d.

clerks, II. 1 e.

neither Comptroller nor deputy shall be interested in a national bank, II. 1 g.

seal, II. 2.

documents, evidence, etc., II. 2.

rooms, furniture, etc., II. 3 a.

to examine banks in District of Columbia, II. 3 b.

annual report of, II. 3 c.

reports to, II. 34, 66.

enjoining, II. 58.

examination of association by, II. 69.

can remove a receiver appointed by him, II. 201 c.

has no authority to subject the United States to State jurisdiction, II. 201 d.

order of, prescribing liability, conclusive, II. 212 b.

certificate of authority to begin business, II. 212 c.

court cannot interfere with action of, II. 216.

cannot interfere with power of control and visitation, II. 201 b, n.

may be reached by proceedings seeking a proper distribution of funds, II. 246.

action of assumpsit will not lie against, II. 246.

receiver is subject to orders, II. 250 a.

improper refusal by, would authorize stockholders to sue, II. 250 a.

decision of, in regard to assets, is final, II. 250 d.

### CONFLICT,

between State and Federal courts, 10.

of laws of different sovereignties, 12.

in the matter of collections, 220.

in regard to a check drawn in one State payable in another, 542.



## INDEX

### CONSTITUTIONAL LAW,

statutes making shareholders liable for redemption of bills are constitutional, 656.

affecting remedy, are constitutional though subsequent, 676, 677.  
establishing interest to be paid by delinquent shareholders are, 676, 677.

it is constitutional for a State bank, so called, to issue bank bills, 664.

### CONSTRUCTION,

of contract, governed by place of performance, 12 (7).

Federal courts not bound by State decisions as to, 10.

of official bonds. See OFFICIAL BONDS.

### CONTINUANCE,

of corporate existence, 765.

### CONTRACT,

Federal courts are not controlled by State decisions as to construction of, 10.

effect of, on real property, 12, n. 4.

effect of, on movables, 12, n. 9 and 10.

distinction between, as a contract, and its effect on property, 12, n. 5.

what law governs interpretation of, 12, n. 3.

capacity to make, 12 (5).

form of, 12 (6).

construction and validity of, 12 (7).

casual contract, 12 (7).

when equity will compel a new contract to be made in proper form, 12 (7).

bank's power to make, 56.

to recover stolen deposit is good, 56.

presumed to be made for a proper purpose, 56.

restrictions on form of, 70.

effect of *ultra vires*. See 722 and ULTRA VIRES.

effect of informalities in execution, 722, 744.

executed in contravention of charter, 722.

though invalid, may be enforced against debtor, 722.

some, may be made without corporate seal, 70, n. 1.

made by president in his own name may bind bank, 144 e.

may not be made for bank by president, without special authority, 144 d, m.

cashier may make, in his name, 170.

by letters, 162.

cannot make collateral, 169.

executed without authority, may bind bank, 98 l, 722.

usurious. See USURY.

### CONTRIBUTION,

shareholders may sue each other for, 692.

### CORRESPONDENCE,

to be conducted by cashier, 162.

### CORRESPONDENT BANK,

liability for, 264. See COLLECTION.

### COUNSEL,

national banks may employ private, II. 256.

## INDEX

- COUNTERFEITING**,  
national bank notes, II. 59, 259.
- COUNTERSIGNING**,  
in what form, may be done by cashier, 158 *i*.
- COURTS.** See **EQUITY JURISDICTION**.
- CREDIT**,  
bank may not lend its, 65.  
bank may take goods on, 58.
- CREDITOR.** See **ATTACHMENT**, **INSOLVENCY**, etc.  
directors may pledge property of bank to secure, 120.  
of insolvent bank is entitled to interest from day of bank's failure,  
II. 246.  
may sue bank on claim after receiver has disallowed it, II. 250 *a*.
- CRIMINAL CASES**,  
larceny by officer, II. 259.  
defaulting cashier, II. 259.  
funds of bank abstracted or wilfully misapplied, II. 259.  
officer acting in bad faith, II. 259.  
embezzlement by cashier punishable solely under Rev. Sts. 5209,  
II. 259.  
purchase of stock with intent to defraud not within Rev. Sts. 5209,  
II. 259.  
perjury, see Rev. Sts. 5392, II. 259.  
director guilty of misapplication of funds, II. 259.  
loan prohibited, but no penalty imposed, by Rev. Sts. 5201, II. 259.  
false entry, II. 259.  
aiding and abetting, II. 259.  
misapplication of funds, II. 259.  
false reports, II. 259.
- CUSTOM.** See **USAGE**.

## D

- DAMAGES**,  
measure of, in suits on official bonds, 42.  
where collateral is lost, 211, 212.  
in suit against collecting bank for default of notary, 250, n. 4.  
in suits by drawer for dishonor of check, 458.  
for default in making collection, 252.
- DATE**,  
of check, 368, 380, 389.
- DE FACTO**,  
bank may do ordinary business, 45, 726 *d*.  
not such as involves privilege, 726 *e*.  
directors, 98 *b*.
- DEBT**,  
power of bank to arrange for saving a, 78.  
bank may buy land to save, 78.  
may carry on a foreign business temporarily to save, 60, 78.

## INDEX

### DEBT — Continued.

- cashier's duty to collect debt owing to bank, 159.
- may indorse bank's paper to pay its, 158 *e, g.*
- may discharge mortgage when debt is paid, 159 *a.*
- may authorize suit for, 159 *d.*
- cannot pledge bank's property for antecedent, 169.
- nor take anything but money in payment, 159 *f.*
- directors may release, 119.
- directors liable for wrongfully incurring, 128.
- restrictions on, 69 *n, o.*
- "previous debt" construed in New York to mean concurrent, 74 *c.*
- limit of banks, II. 36.
- principal, not forfeitable for usury, II. 230.
- may be deducted from value of stock taxed, II. 241.

### DEFAULT,

- notification of, 38 *A.*

### DEFENCES. See OFFICIAL BONDS, COLLECTIONS, CHECKS, 7, 8, 9.

- of bank to drawer's suit for dishonor of check, 459.
- of shareholders to suit by bank's creditors. See SHAREHOLDERS, 5.
- in case of *ultra vires* transactions, 722.

### DEFINITIONS,

- general, of bank, 2.
- of savings bank, 3.
- of bank, for purposes of United States taxation, 4.
- of State bank, 5.
- of national bank, 5.
- of usage, 9, *n. 1.*
- of "individual" banker, 13, *n.*
- of "private" banker, 13, *n.*
- of depositor, 179, *n.*
- of special deposit, 183, 190.
- of specific deposit, 185.
- of "insolvent", "in failing circumstances", "act of insolvency",  
"contemplation of insolvency", 622, 623 *a.*
- of bank notes, 635, 636.
- of post notes, 636.
- of check, 362.
- of lien and set-off, 323.

### DELIVERY,

- by express company, how affected by banking hours, 46 *a.*
- as to what constitutes, see 9, *n. 9.*
- of paper, place of, is the place of performance except as to parties  
without notice, 12 (7).
- and acceptance of official bonds, 20.
- of circulating notes, II. 21.
- of deposit to proper officer, 98 *j*, 174 *a*, 179.
- sufficient to constitute gift,
  - of check, 548.
  - of deposit, bank-book, etc., 607.

### DEMAND. See PRESENTMENT, ACTION, COLLECTION.

# DEPOSIT,

how far may be followed by true owner, 341, 565, 590 *et seq.*  
to redeem circulation, II. 42 c.  
of bonds for circulation, II. 216.  
banks of, are not included in "banks of issue", II. 230.  
in savings banks, 616.  
by the United States, II. 245.

## (1) Receiving,

the relation is at will, saving lien, etc., 178.  
bank may choose from whom it will receive, 178.  
except under statute, as in Wisconsin, 178.  
this choice is part of cashier's powers, 161.  
may be received in any name, 178, n.  
may be received from another bank, 178, n.  
care should be taken to give to proper officer, 179, 204.  
and at the bank, 46 e, 168 f, 179.  
cashier may receive, 161.  
president may receive, 143.  
two banks receiving through same officer, 180.  
appropriation of, 180 A, 327 c.  
by the bank to debt barred by limitation, 327 d.  
care in crediting, case of deaf depositor, 181.

## (2) Kind of,

special, 183; specific, 185; general, 186.  
deposit of paper, 187.  
additional titles do not affect nature of deposit, 186.  
a commission does not always make the bank a bailee for hire, 209.  
change of one kind to another, 187.  
usage as affecting the nature of a deposit, 184.  
bank transmitting deposit acts as agent, 567 c.

## (3) Special,

definition, 183, 190.  
power of bank to receive, 48, 191.  
savings bank may receive, 191.  
when coin is, 184, 568 b.  
distinction between United States and foreign coin, 184.  
what may be a, 192.  
is no part of bank's assets, 205.  
cannot be used, 205.  
not a basis for issue of bank notes, 666.  
the identical thing, with all its accumulations and profits, must  
be returned, 193.  
title to, is not in the bank, but in the depositor, 565.  
liability of bank for,  
general review of the subject, 194.  
gross negligence the line, 194.  
held equal to fraud, 194.  
to lack of slight care, 194.  
to lack of ordinary care, 184, 197.  
to lack of the same care as the bank takes of its own, 196.  
the best opinion requires ordinary care, 194, 198.  
bank always held for bad faith, 194.  
bank never held for more than ordinary care, 194, 199, 200.  
case of theft, bank liable for gross negligence, 195.

DEPOSIT — Continued.

(3) Special — Continued.

- wilful act of officer beyond his sphere of duty, does not make bank liable, 102 *e*, *h*, 201, 202.
- varying the contract by agreement, 203.
- representations of cashier, 203.
- delivery of, 204.

(4) Specific,

- definition, 185.
- proceeds of collection, 185.
- duty of bank in regard to, 207.
- must not be applied to other than the specified purpose, instructions must be obeyed, 207, 208, 224.
- bank has no general lien on, if inconsistent with purpose of deposit, 208, 325.
- interest on, 205.
- liability of bank,
  - for money deposited specifically, 210.
  - collateral security, ordinary care, 211.
  - collateral security stolen by president, 212.
  - ordinary care is required of the bank, and *a fortiori*, gross negligence makes it liable, 212.
  - where the purpose for which deposit was made fails, 208.
  - evidence of, 210.
- bank bills as collateral, 638.
- paper deposited for collection is a. See COLLECTION.
- title to, 565 (2, 9).

(5) General,

- a deposit is presumed to be, 186.
- additional titles do not affect nature of deposit, 186.
- creates the relation of debtor and creditor, 289.
  - an order to credit on general account creates this relation, though a specific direction follows, 186.
- deposit of paper, 186, 187.
- deposit after bank hours, kept separate, 289 *c*.
- insolvency of the depositary does not affect the relation, unless it was kept separate or the reception was a fraud, 289 *c*, 629.
- See INSOLVENCY.
- bank transmitting to another bank acts as agent, 567 *c*.
- forged bills and base coin, 289 *d*.
- forged bills of the depositary, 289 *d*, 659.
- bills of insolvent bank, 289 *d*, 633, 662.
- writings in the course of banking business,
  - bank-books and their effect, 290, 291, 295.
  - pass-book not negotiable, 290.
  - entries only *prima facie* evidence, 291.
    - no by-law can change this rule, 291 *d*.
    - not conclusive as to title to deposit, 293.
    - acquiescence in account stated, 291 *e*, 292.
  - items of a balance cannot be gone into after six years from the balance, 291 *e*.
  - silence of depositor casts burden of proof on him, 291 *e*.
  - depositor held to ordinary care in examining, 291 *f*, 461, 470-473.

DEPOSIT — Continued.

(5) General — Continued.

- inspection of books, and inquiry concerning accounts, depositor's rights, 294.
- stockholder's right, 294 *a*, *n*.
- partner's right, 294 *a*, *n*.
- prosecutor's right, 294 *a*, *n*.
- check-holder's rights, 294 *a*.
- when bank may reveal the state of an account, 294 *a*, 446.

See CERTIFICATE OF DEPOSIT.

interest, 309.

- general deposit does not usually bear, 309.
- may by agreement, 309. \*
- usage or mode of dealing, 309 *a*.
- usury laws, 309 *b*.
- "rests", or compoundings, 309 *c*.
- death, settlement of accounts, insolvency, 309 *d*.
- time for which, is to be cast, 309 *e*.

payment of,

- obligation of the bank, 311, 311, *n*.
- obligations of a private banker, 311, *n*.
- no obligation till condition has been fulfilled, 311, *n*.
- no obligation, if money does not belong to depositor, 311, *n*.
- for what sort of funds the depositor may draw, 312, 447.
- must be in good money, and usage to the contrary is bad, 9, *n*. 9.
- under verbal order, 313.
- telegraphic order, 457 *a*.
- without order, 314, 314, *n*.
- the orders may be for any part of the deposit, 315.
- unless vexatiously multiplied, 315.
- bank must not pay on paper it knows to be void, 316.
- duty of bank as to trust funds,
  - it is not required to examine into the purposes to which the money drawn is to be applied, 317.
  - nor can it refuse to pay a check in proper form, because it has reason to believe the money is to be improperly used, 317.
  - but it must not itself participate in the misapplication, or profits thereof, 317.
- by mistake, 454.
- after death of depositor is known, 319½.
- of forged paper, binds the bank, 171 *h*.
- forced, 318.
- in case of depositor's insanity, 319.
- in case of depositor's death, 319½.
- in case of unclaimed deposits, 320 *A*.
- State may provide that such shall escheat to it, 320 *A*.
- payment to guardian, 319 *A*.
- when one bank succeeds to the business and assets of another, 320.
- the new bank owes the depositors of the old, 320.
- as affected by the Statute of Limitations, 321.

## INDEX

### DEPOSIT — Continued.

#### (5) General — Continued.

appropriation of payments made by the bank, first payment is applied to first sum deposited, except when trust funds are mingled with private, 355.

on forged indorsement may amount to acceptance of check, 474.  
in forged paper or base coin, 448.

order of, 319 B, 450.

recalling, 449.

passes by bequest of "all my debts", etc., 606.

liability of bank for, 199, 289.

See CHECKS, 7, 8. See NOTES.

(6) Attachment of. See ATTACHMENT.

(7) Recovery of, in case of insolvency. —See INSOLVENCY.

(8) Lien on. See LIEN.

(9) Title to. See TITLE.

(10) Adverse claim to, 341.

### DEPOSITARY,

of public money, bank designated as, 48, II. 45, 83 G, 245.

DEPOSITOR. See DEPOSIT, BANK-BOOK, CHECK, LIEN, ACTION, GUARANTEE FUND.

### DEPOSIT SLIP,

use of, 207, n.

purport of, 290, n., 297, n.

made in name of another by mistake, 290.

### DEPUTY,

of Comptroller, II. 1 d, g.

### DIRECTORS,

obligation to own a certain number of shares, 138.

may divide management among several boards or committees, 115.

but the mere appointment of a finance committee is not the grant of power, but the imposition of a duty, 115.

authority,

general control and management of bank's affairs, 116.

power to delegate their functions, 116, 118. Arkansas, *contra*, 128, n.

power over surplus funds, 116, n.

some functions exclusively theirs, 116.

general superintendence, 116.

legislative and judicial functions, 116, n.

allowing discounts, 117.

may delegate authority to allow certain discounts, but no general authority, 117.

to issue bank bills, 121.

to release or compromise a debt, if for the bank's interest, 119.

to release claim against a faulty officer to secure his evidence, 119.

to pledge or assign the bank's property to secure creditors, 120.

to arrange with other banks to collect notes and dividends, redeem bills, transfer stock, etc., 122.

to discharge any officer or employee of the bank, 123.

## INDEX

### DIRECTORS — Continued.

#### authority — Continued.

rests in them only as a board, 124.

majority of a quorum at a regular meeting necessary, 124.

an individual director as such has no power, 132.

#### no authority,

to deal with themselves personally, 116, n.

to represent the bank in a transaction of individual interest, 116, n.

to delegate legislative or judicial authority, 116, n.

to contribute for construction of a railroad, 127 *a*, n.

to work any radical or organic change, 127.

as increasing or reducing capital, 127.

to needlessly assume liabilities for bank, 119.

to give away bank's property, 127 *a*.

or make the bank a gratuitous surety, 127 *b*.

or misapply bank's funds to their own uses, 127 *b*.

to vote on a matter when interested personally, 125, 125 *b*, n.,  
127 *d*.

in favor of an *innocent* third party, the bank is nevertheless  
bound, 125 *b*, 127 *c*, *d*, *e*, *f*.

to delegate their functions, in Arkansas, 128, n.

to make assessments on capital stock to make up an impairment deficiency, 127, n.

limitations on authority, 116, 125, 127, 671.

to release a shareholder from liability as a subscriber, 119,  
671.

to pledge future dividends of the bank to meet a deficit in  
capital, 120.

#### duty,

to show reasonable capacity for the position, 125.

to act with good faith, and reasonable care and skill, and not  
disobey the organic law, 125.

not to acquire any interest adverse to bank, 125 *a*.

nor make a profit from their trust beyond what is common to  
other stockholders, 125 *b*.

nor vote nor use influence where directly interested, 125 *b*.

to repudiate the wrongful acts of officers, 126.

and discharge the guilty, 126 *a*.

as trustees, to act for the interests of the public, 125.

of depositors, 125.

of stockholders, 125.

toward persons proposing to become sureties on some officer's  
bond, 21 *c*.

no duty to possess expert knowledge of bookkeeping, 125, n.

#### rights of, 114, 124, 125.

are entitled to notice of meetings, 124.

are entitled to access to books and accounts, 124.

no by-law can destroy these rights, 124.

mandamus will lie in favor of an excluded director, 124.

to take loan from bank in absence of statutory prohibition,  
125 *c*, n.

if statute does prohibit loan to director, loan to his firm is  
illegal, 125 *d*.

but loan to another for use of director is good, 125 *d*.



**DIRECTORS — Continued.**

rights of — Continued.

*ultra vires* loan not void between the parties, 125 *e*.

may cause forfeiture, 761.

holding bills of the bank, when insolvent, 641 *b*.

representations of, 103 *a*.

false statements of condition of bank, 132.

libel in corporate reports, 132.

notice to, 133.

presumed to know what by proper diligence they might know, 133.

a single director, 134.

cases in which the director having notice acted for the bank in the matter, 134 *b*.

knowledge must be actual, 135.

and material to the transaction, 134.

cases where director did not act, 136, 136 *e*, *f*, *g*.

or was known by the third party to be adversely interested, 136 *c*, *d*.

absent director's knowledge, 136 *b*.

always of full effect as against himself, 137.

but in suit between a bank and its directors, a director is not presumed to have knowledge of all that is shown on the bank's books, 137.

liability of, 114.

for not requiring an examination of the condition of the bank with reasonable frequency, 128, *n*.

for not exercising care of ordinary men, 128, *n*.

for failure to comply with statutory requirements, 128, *n*.

for wilfully using trust property for unauthorized purposes, 128, *n*.

for taking no step to close bank after its insolvency is known, 128, *n*.

to third parties for gross neglect, fraud, or breach of law, 130.

to shareholders, 717.

quare, if the receiver should not sue rather than the shareholders, 144 *i*, 717 *c*.

directors of savings banks to depositors for ordinary negligence, 130.

as where by neglect of due care their associates are enabled to do disastrous acts, 130 *f*.

directors of a commercial bank runs only to the bank for ordinary negligence, 130.

held for loss of special deposit by theft, 130 *c*.

held for loss when management has been entrusted to president, 130 *f*.

not held for failure to discover and prevent discount of improperly secured paper, 130 *d*.

nor for failing to prevent a hazardous loan made without their knowledge, 130 *e*.

nor for secret peculations and false entries of cashier, 116, *n*.

nor for negligence of officers in paying out money on unauthorized checks, 116, *n*.

**DIRECTORS — Continued.**

liability of — Continued.

- nor when acting only as agent of another, 128.
- nor when never notified of election, 128.
- for false statements in corporate reports, 132.
- for over-issue of notes, 128 *c*.
- for payment of overcheck, 137.
- how shareholder's liability affects, 687.
- for amount of notes taken in payment of stock, in breach of their duty, 719 (8).
- only those who are involved in the causation of the damage are liable, 128.
  - dissenting directors not liable, 128 *j, k, l*.
  - Georgia *contra*, 128 *i*.
- for negligent supervision, 128.
  - it is not negligence to allow a well selected cashier to hire his own clerks, 128 *e*.
  - nor to intrust to him all the discretionary powers which usually appertain to the immediate management of the bank's business, 116.
- for wrongly declaring dividends, 128 *a*.
  - shareholder may enjoin such action, 128 *b*.
- for putting bank in debt beyond the legal limit, 128 *g*.
- for loan in excess of legal limit, 128 *l*.
- ignorance of fact no excuse if they ought to have known, 128 *d, m*.
- ignorance of law may excuse, 128 *d*.
- ill health producing ignorance of bank's affairs no excuse, 128 *f*.
- spending time abroad no excuse, 128 *g, n*.
- temporary illness an excuse, 128 *f, n*.
- does not end with charter, 128 *h*.
- if excessive authority is carelessly or knowingly assumed, the officer is liable in tort, 128 *n*.
- if a contract is made in good faith in bank's name, the directors are not liable, though both parties mistook their power under charter, 128 *n*.
- claim against, is assets of the bank, 129.
- ordering cashier to act unlawfully, 172 *b*.
- as sureties on bond of officer, 21 *a*.
- qualifications of, 138.
- continuance in office, 139.
- pay of, 140.
- records to be kept by, 141.
- de facto*, 98 *b*.

**DISCHARGE,**

- of mortgage by cashier, 159.
- under a foreign bankruptcy, effect of, 10, *n. 4*.

**DISCOUNTING,**

- as affected by statutes in restriction of banking, 13.
- continuousness necessary to make it banking, 13.
- as distinguished from purchasing, 49, 72, 73.
- not usurious, by usage, 9, *n. 9, 50* and notes.
- power of, lodged in directors, 117.
  - to what extent may be delegated, 117.

## INDEX

### DISCOUNTING — Continued.

to director, 125.

if illegal, then is also illegal to director's firm, 125 *d*.

test of illegality where director is interested, 125 *d*.

illegality of, does not avoid the contract, 125 *e*.

dishonestly procured by director, 134 *b*.

### DISHONOR. See NOTICE, COLLECTION, CHECK.

### DISSOLUTION, 766,

voluntary, II. 42, 43, 242, 243.

notice of intent to dissolve, *ib*.

notice to bill-holders in case of, II. 47.

ends power to transfer stock, II. 42 (*a*), *n*.

### DIVIDEND,

power of bank to declare, 66.

of directors to declare, 128, II. 33.

directors liable for improperly declaring, 128 *a*.

may be prevented in equity, 128 *b*.

once declared, is payable absolutely, 128 *b*.

may be set off against shareholder's debt to bank, 699 *e*, II. 35, 212, 235.

shareholder may sue for, 708.

duty of bank in respect to, when it holds stock as collateral, 716.

effect of wrongfully declaring, 717.

report as to, II. 34.

payment of, by receiver, II. 50 *c*.

### DOMICIL,

may estop one in the courts of another State, 12 (*8*).

### DONATIO CAUSA MORTIS,

of deposit, 607.

of check, 548.

### DRAWER. See CHECK.

may sue bank for improper refusal to honor his check, 468.

for wrongful payment, 454-456.

may ratify wrong payment, 471.

has a right to the possession of paid checks, unless they are unsettled over-drafts, 46.

cannot throw on the bank the burden of care he should himself bear, 474 *e*.

may make himself liable on forged paper, 468, 476 *a*.

is held to due diligence in his dealings with the bank, in drawing checks, examining his accounts, etc. See CHECKS, 8.

discharged by certification after issue, 414.

otherwise by certification before issue, 415.

at death of, equity will give relief to a check-holder, 511 *h*.

### DUPLICATE CHECK,

indorsement, effect of, 422, *n*.

## E

### ELECTION,

of directors, II. 9 and 10 *a*, 109.

of president, II. 9 *f*.

failure to hold on proper day, II. 9 *e*.

**EMBEZZLEMENT,**

- by cashier, 173 *a*.
- as covered by official bond, 25.
- by officer of national bank, II. 259.
- penalty for, II. 55.

**ENTRIES.** See Books.

**EQUITY,**

- will compel execution of a contract in proper form in some cases, 12 (7).
- as issue of new check to replace lost check, 395 A.
- cannot be invoked to restrain illegal banking, 13.
- for accounting on an ordinary deposit account, 289 *e*.
- may interfere to prevent improper declaration of dividend, 128 *b*.
- power of, to follow embezzled funds, 173 *a*.
- will give lien for immature debt, 329.
- will relieve check-holder in case of drawer's death, 511 *h*.
- affords proper remedy to enforce liability of shareholders, 693.
- will apportion surplus among shareholders, 706.
- bill in, cannot be maintained on an illegal loan, II. 229.
- will enjoin officers from wasting assets, 157 *b*.
- will restrain collection of illegal tax when no legal remedy exists for recovery, II. 241 *o*, *x*.
- will restrain State authorities from collection of a discriminating tax, II. 241 *n*.
- will relieve from inequalities of valuation only when intentional, II. 241 *x*.
- may adjudicate as to validity of tax, II. 241 *b*.

**ESTOPPEL,**

- of corporation to deny powers and functions of officer, 98 *c*, *l*.
- of person dealing with bank to deny its corporate character, 14 *a*, II. 206 *a*.
- Lord Campbell's statement of, 472.
- of bank to assert lien, 331.
- of cashier to deny his authority, 176 *a*.

**EVIDENCE,**

- judicial notice of organic statutes, 14 *a*.
- of banking business, 14 *a*, *n*.
- of banking hours, 45 *a*.
- of usage does not conflict with rule excluding parol variation of written contract, 9 F.
- what is competent, 9, *n*. 1.
- in suits on official bonds, 42.
- entries in books of bank, as against bank, 171 *i*.
- as in favor of bank, 292, 295.
- entries in bank books as, of name of contracting party, 295.
- as, of implied contract, 292.
- as affected by Statute of Limitations, 291.
- by lapse of time, 291.
- competence of bank officers, 113, 295.
- of shareholder, 113 *b*.
- of agreement by collecting bank to notify all indorsers, 232.
- of selection of proper agent by collecting bank, 236.
- placard hung in bank as, 218.

## INDEX

### EVIDENCE — Continued.

- of title to bank bills, possession, 652.
- specific, required in case of destroyed bills, 648.
- of usage to allow grace on a draft payable at a future day certain, 387.
- effects of checks as,
  - between drawer and payee, 552.
  - between drawer and bank, 553.
- of corporate character of bank, II. 6, 206.
- Comptroller's certificate of organization conclusive against stockholders and creditors, II. 206 *a*.

### EXAMINATION,

- of bank by special agent, II. 47.
- by Comptroller before authorizing the commencement of business, II. 17.
- of registry and bonds, II. 20.
- of national bank by Comptroller, II. 69.

### EXAMINERS,

- appointment of occasional, II. 54, 254.

### EXCHANGE,

- may be bought by bank, 49.
- is not the same as "buying" bills of exchange at any agreed price, 49, *n*.
- of three and a half per cent bonds for three per cent, II. 77.
- of coin for gold certificates, II. 78.

### EXCUSE,

- for failure to present, protest, or give notice, condensed statement, 262, 263.

### EXECUTOR,

- check drawn against deposit of, 438.
- liability of, II. 263.
- not personally liable as stockholder, II. 63.

### EXEMPTION,

- of municipal bonds, savings deposits, etc., does not affect the taxation of national banks by the State, II. 241 *y*.
- of particular property, or moneyed capital, does not affect same, unless an unfriendly discrimination, II. 241.

### EXISTENCE OF BANK,

- evidence of, 14 *a*, II. 206, 206 *a*.
- judicial notice of charter, 14 *a*.
- may be extended, 14 *a*, *n*, II. 67, 79.
- certificate of Comptroller of Currency is conclusive of necessary prerequisites of extension, II. 67.
- continues after appointment of receiver, II. 250 *a*.
  - after appointment of superintendent of banks, 622 *A*, *n*.
  - after voluntary liquidation, 622 *A*, *n*.
  - until charter expires, forfeiture or judgment of dissolution, 14 *a*.
- continuance of, presumed, 14 *a*.
- estopped to deny, when, 14.
- Secretary of State must file certificate extending when, 14 *a*, *n*.

## INDEX

### F

#### FEDERAL COURTS,

- are free on questions of general commercial law, 10.
  - also on construction of contracts, 10.
  - also on extra-territorial matters, 10.
  - and from State decisions that are clearly unjust, 10.
- have no power to declare national banks bankrupt, II. 246.
- have jurisdiction in all cases to which a national bank in same district is a party, II. 257.

#### FEES,

- of receiver, II. 51.

#### FINDER,

- of bank bills holds against all but true owner, 654.

#### FIRM CHECKS. See CHECKS, 7.

#### FORFEITURE,

- causes of, 760.
  - what acts of an officer constitute, 760, 762.
  - Massachusetts law, 760, 762.
  - common law, 760, 762.
  - mistake, 760, 761.
  - internal *ultra vires*, 760, 762.
  - non-user, 760 *a*, 761.
  - misuser, 761.
  - illegal loans, 761.
  - failure to make required statements, 761.
  - failure to pay in capital, 761.
  - fraudulent increase of assets, 761.
  - usury, 761.
  - suspension of specie payment, 761.
  - withdrawal of capital, 761.
  - a single wilful neglect, 761.
  - insolvency, 761.
  - embezzlement, 761:
  - borrowing beyond limit, 761.
  - wrongful issue, 761.
  - wrongful agency in another State, 761.
- effect of occurrence of a cause of forfeiture,
  - until forfeiture is judicially decreed, bank may do business, 763, II. 46.
  - unless the organic law declares to the contrary, 763.
- waiver of, by legislative action, 764.

#### FORGED BILLS,

- are not a good deposit or payment, 659, 660.
- change of numbers held to vitiate bills, 661.
  - contra*, 650 *a*.

#### FORGED CHECKS. See CHECKS, 8.

#### FORGED PAPER,

- payment of, by cashier, binds the bank, 171 *h*.
- proceeds of, held for true owner, 248 *b*.
- payment in, 448.

## INDEX

### FORM,

- of contracts in general, 12 (6).
- of corporate contract, 70.
  - restrictions as to, 70.
  - use of seal, 70, n. 1.
  - signature of, 744.
- of official bonds, 19.
- instruments in form to or from the cashier, though really for the bank, 170.
- of check, if suspicious, bank should make inquiry, 363 b.
  - of corporation, 154 a, 440 b, c.
  - of firm, 439 c.
- of signature on a check that will bind a bank, 154 a.
- of indorsement, 158 h.
- of certification, 155 c. See CHECKS, 4.

### FORMALITY,

- imperative, 729.
  - neglect of, prevents recovery on the contract, 743.
  - as to signature of corporation contracts, does not affect daily routine business, 744.
- directory,
  - only provides a form that will be sufficient, not exclusive of other forms, 743.
- difficult to decide whether a, is imperative or directory, 743.
- distinction between informality and *ultra vires*, 729.
- distinguished from essentials in case of checks, 363.

### FRANCHISES,

- forfeiture of. See FORFEITURE.
- cannot be taken into another sovereignty, 46 b.
- may be in part abandoned by bank, 67.

### FRAUDS, STATUTE OF,

- as affecting verbal promise of bank to pay check, 408.

### FUND, DEPOSITOR'S GUARANTEE,

- may be established, 13, n.
- to what applies, 13, n.
- lien for benefit of, 13, n.
- Reserve,
  - may be required, 13, n.

### FUNDS,

- Misapplication of, 52, n.

## G

### GIFT,

- of deposit,
  - inter vivos*,
    - by transfer of bank-book, 608.
    - by written assignment, 608, n.
    - by order on bank to pay donee, 608, n.
    - by deposit in name of donee, 609.
    - by delivery of indorsed check, 609 A.

## INDEX

### GIFT—Continued.

#### of deposit—Continued.

- by declaration of trust, 610.
- donor the trustee, 610.
- retaining the book, 610.
- donee receiving no notice, 610.

#### *causa mortis*,

- requisites, 611.
- contemplation of death, 611, 612.
- intent that gift shall take effect only on the death of donor, 611, 612.
- delivery, 611, 612.
- death from the cause contemplated, 611, 612.

#### no gift,

- no intent, 613.
- testamentary intent, 614.
- no delivery, 615.

#### of bank's property, 62.

### GOLD-NOTE BANKS,

- reserve fund of, II. 24 *c.* See II. 78.
- duty of, to receive notes of other associations, II. 24 *c.*
- authority of, to issue notes, II. 24 *b.*
- may become currency banks, II. 65.
- certificates of, shall bear date of the original organization, II. 65.
- See II. 44.

### GOVERNMENT,

- securities, bank may deal in, 59.
- receiver cannot subject to jurisdiction of courts, II. 250 *a.*
- has first lien on any assets of insolvent bank, II. 250 *c.*

### GRACE,

- upon checks, 377.
- allowed on instruments in form of checks payable at a future day certain, 381 *a.*, 383.
- contra*, 381 *b.*, 383–385.
- discussion of the question, 386.
- usage is admissible in evidence, 387.
- usage must be distinguished from courtesy, 9, n. 1 *c.*, 387.
- what law governs, 12 (7).
- demand paper has, and usage to contrary is bad, 9, n. 9.

### GUARANTEE FUND,

- may be established, 13, n.
- to what applies, 13, n.
- lien for benefit of, 13, n.

### GUARANTY,

- of negotiable paper not rendered void by usury, II. 230.
- a national bank successor to State bank may enforce, II. 244 *b.*

### GUARDIAN,

- as such, not personally liable as a stockholder, II. 263.



## INDEX

### H

#### HISTORY,

a proper guide as to what constitutes banking, 47.

#### HOLDER,

of bank bills,

rights of. See BANK BILLS.

of check may sue drawee bank for improper refusal to pay (?). See CHECKS, 9.

of a note payable at a bank may sue the bank if money has been deposited to pay it, 564 *a*.

*contra*, 564 *b*.

#### HOLDING OUT,

of an officer as having authority, by failure to object to his acts, 171 *g*.

of one as president, liability created, 148.

of one as director, liability created, 131.

#### HOLIDAY,

by usage, 9, n. 9.

### I

#### IGNORANCE,

of usage, its effect, 9, n. 3.

of bank's business, not excused by ill health of director, 128 *f*.

of any fact which might by due diligence have been discovered, is not innocent, 128 *d*, *m*.

of law may excuse, 128 *d*.

#### INCIDENTAL POWERS,

of a bank, 54.

of a national bank, II. 208.

#### INCREASE,

of capital, II. 13.

requires Comptroller's approval, II, 13, 213 *a*.

of deposit as security for circulation, II. 16 *b*.

of circulation, II. 75.

#### INDEMNITY, BOND OF,

may be given by depositary to secure public money, 48, n.

may be required of those transmitting money, 13, n.

in case of lost or destroyed bills, 648, 649, 649 A, 650, 650, n. 1.

in case of lost certificate of deposit, 306.

held not necessary in certain cases, 649 B.

#### INDICTMENT,

sufficiency of, II. 259.

#### INDORSEMENT,

for accommodation, not lawful, 65, 156.

may, however, bind the bank, 98 *l*.

form of, by cashier, 158 *h*.

cashier's power of, for bank, 158, 159, 165 *d*, 169, 171.

cashier's, per proc., 98 *h*.

"for collection", effect of, 159 *b*, 217, 576, 583, 593, 594.

"for deposit", 577.

INDORSEMENT — Continued.

- of checks,
  - various significations of, 391.
  - when a mere receipt, 391.
  - intent governs, 391.
  - payable to bearer, 391.
  - away from bank good, 168 c.
  - by a lunatic, 392.
  - forged, 461, 474 *et seq.* See CHECKS, 8.
- of certificates of deposit, 300.
- in blank, to bank for collection, does not pass title to that bank, but a subsequent *bona fide* holder will have good title, 565 B. 3.

INDORSER,

- of check, rights of, as to presentment, 259. See CHECKS, 5.
- bound by customs of bank, 9 A-9 F.

INJUNCTION. See 347. See EQUITY.

- against alienation of bank's property, 721.
- against waste of assets, 157 b.

INSANITY,

- of depositor, as affecting payment of his deposit, 319.

INSOLVENCY. See NATIONAL BANKS.

- definition of "insolvent", and "in failing circumstances", 622.
  - of "act of insolvency", "contemplation of", 623 a.
- effect of insolvency, 622 A.
- assets may be turned over to those who give bond for its liquidation, 622.
- preference, 623-629, II. 252.
  - transfer in contemplation of insolvency is a wrongful, 623.
  - a lien is not a, 624.
  - transactions *bona fide* in regular course of business not wrongful, 625, 626.
  - provided for in charter, 627.
  - trust funds mingled indistinguishably no, 589 b, 629 b.
  - creditors by lawful contract preferred to claimants under transactions *ultra vires* the charter, 749 b.
  - check-holder has none in insolvency, 511 k.
  - States are not preferred creditors, either as shareholders or depositors in banks, 718.
  - States are preferred when they are depositaries, 627.
  - in case of special and specific deposits, 567.
  - debts lawfully incurred preferred to *ultra vires* debts, 749 b.
  - appointment of receiver, 625 O.
  - removal of receiver, 625 C.
- payments in course of business good, 625.
  - out of the usual course invalid, 625.
  - after appointment of receiver, 625 A.
  - of check after insolvency, 452.
- liability of officers receiving deposit, knowing of, 628.
- deposit recovered,
  - if kept separate, 589, 629.
  - if its reception was a fraud, 629.
  - otherwise no preference, 589 b, 629.
  - proof of claim, 629 A.
  - special or specific deposits, proceeds of collection, trust moneys,

INSOLVENCY — Continued.

- deposit recovered — Continued.
  - etc., if so mingled with the bank's assets as not to be traceable, cannot be recovered in preference to other creditors, 589 *b*, 629, 630.
  - contra*, 567 *a*, 568 *d*.
- money received after formal, recovered in full if the ownership is determinable, 631.
- of a savings bank,
  - outside creditors preferred to depositors, 632.
  - contra*, in some States, 632, *n*.
  - depositor has no set-off, 632 *a*.
  - special deposit may be recovered, 632 *b*.
  - but calling a deposit special does not make it so, 632 *d*.
  - transfer from one deposit to another, fraudulent, 632 *c*.
- of a loan, trust and investment company,
  - its directors and stockholders may file a bill to have a receiver appointed, 632 *A*.
  - jurisdiction of attorney general to wind up its affair, 632 *A*, *a*.
  - of federal court on request of non-resident creditor, 632 *A*, *a*.
  - by-laws construed, 632 *A*, *b*.
  - trust agreement construed, 632, *A*, *c*.
  - debenture holders may intervene in a request for a sale of securities, 632 *A*, *d*.
  - statutes construed, 632 *A*, *e*.
  - assets may be purchased, 632 *A*, *f*.
  - preferences, 632 *A*, *g*.
  - set-off may be allowed, 632 *A*, *h*.
  - contra* in Connecticut, 632 *A*, *h*.
  - superintendent of banks,
    - may demand security, 632 *A*, *i*.
    - right of action of, 632 *A*, *i*.
    - cannot demand a release for wrongful detention of securities, 632 *A*, *i*.
    - may sue and be sued as a receiver, 632 *A*, *i*.
    - does not succeed to execution of a trust, 632 *A*, *i*.
    - must provide a place to transact business, 632 *A*, *i*.
  - creditors are entitled to interest when, 632 *A*, *j*.
  - temporary receiver, separate suit not necessary to compensation of, 632 *A*, *k*.
  - creditor of liquidating bank has preference over purchasing bank, 632 *g*.
  - sale of charter is against public policy, 632 *h*.
  - money paid by surety of defaulting treasurer belongs to depositor, 632 *i*.
- of national bank, II. 52, 246–252. R. S. 5226–5238, 5242.
  - provisions for, not superseded by Bankrupt Act, II. 246.
- return of *nulla bona* ample evidence of, II. 246.
- set-off of bank bills in case of, 641.
- of the issuing bank as affecting the contract between transferrer and transferee of bank bills, 662.
- revokes power of collecting bank to credit the proceeds on general account, 248 *a*, 568 *e*.

## INDEX

### INSOLVENCY — Continued.

- maker of a note held by bank may insist on the application of his deposit to the note in case of the bank's insolvency, 560.
- set-off in case of
  - depositor, 337.
  - a commercial bank, 338.
  - a savings bank, 339.

### INSTRUCTIONS,

- relating to collections, must be obeyed by the bank, 207, 208.
  - must be duly forwarded, 224, 235.
- bank can only pay deposit in accordance with, 474.
- relating to any specific deposit must be followed, 207, 208, 224.

### INTEREST. See USURY.

- rate of, may be governed by the law of
  - the place of payment, 12, n. 15.
  - the place of making the contract, 12, n. 15.
  - the place of using the money, 12, n. 15.
  - the place of suit, as to interest recovered as damages, 12, n. 15.
- restrictions on, 69, *n. o.*
- on over-drafts, 309.
- that may be taken by national banks, II. 30, 230.
  - forfeited by taking usury, II. 230 *c.*
- construction of clauses in charter concerning, 750.
- on certificates of deposit, 307-309, 675, n.
- on general deposit, 309.
  - usually none, 309.
  - but may be by usage or agreement, 309.
  - "rests", or compoundings, 309.
  - time for which it is to be cast on running account, 309.
  - termination of agreement as to, by death, 309.
  - payable to depositor or other creditor of insolvent bank, II. 250 *c.*
- on bank bills, runs from demand for redemption, 645.
  - runs against shareholder only from demand on him (?), 689.
- on bonds deposited as security for circulation, II. 26.
- conflict of laws as to, 12, II. 230 *e, f.*
- to take out interest in advance is not usury, II. 230 *e.* See DIS-COUNTING.

### INTERPRETATION,

- of contracts, what law governs, 12, n. 3.

### ISSUE,

- of checks, 390.
- of bank bills,
  - power to, 53, 634.
  - function of directors, 121; their duty, 125.
  - constitutionality of, by State banks, 654.
  - restriction on, of bills of other banks, 666, II. 39.
    - construed not to cover the case of a deposit of such bills, 666.
  - a special deposit not a basis for, 666.
  - bank cannot, in another State than its locus, 46 *d.*
- of gold notes, II. 24 *b.*
- over, liability of directors for, 128.

## INDEX

### J

#### JUDGMENT,

against bank, not conclusive against shareholder, 688.

#### JUDICIAL NOTICE,

of charter, 14 *a*.

of banking hours, 45 *a*.

#### JURISDICTION. See ACT.

of State and national courts over national banks, II. 57, 70, 82, 257.  
over receivers of, II. 250 *c*.

in respect to crimes committed by officers of, II. 259.

of District Court, II. 57.

of Circuit Court, II. 57, 82, 84 (*g*), *n*.

of Court of Claims, II. 201 *d*.

of State courts in cases of usury under United States law, II. 230.

State courts have, of suits to recover penalty for usury, II. 230 *h*.

exclusive, of Federal courts in cases of national import, II. 230 *m*.

concurrent, of Federal and State courts in other cases, II. 230 *m*.

removal from, of State courts, II. 57, 82.

officer of national bank guilty of larceny comes within jurisdiction of  
State courts, II. 259.

State courts of States other than the locus have no jurisdiction over  
national banks, and even appearance will not confer, II. 257.

section 11 of the Judiciary Act does not affect, in national bank cases,  
II. 257.

a right, legal or equitable, arising under either system of laws, State  
or Federal, may be enforced by courts of the opposite persuasion,  
II. 230 *m*.

### K

#### KNOWLEDGE. See NOTICE.

by president of an indorser's address is knowledge of the bank, 146 *a*.  
of a usage, actual, 9 *e*.

affected by generality, 9, *n*. 18.

director chargeable with his own, 137 *c*.

of director, 133.

of cashier, 166.

### L

#### LAND,

bank may hold in another State, 46 *c*.

power of bank to deal in, 46 *A*, 55, 74-76.

#### LARCENY,

by officer of bank, II. 259.

#### LAWSUITS,

power of cashier in respect to, 159 *d*.

may be instituted by president, 143.

conducted in president's name (*N. Y.*), 144 *l*.

#### LEGAL TENDER,

depositor entitled to receive pay in, 312.

bank bills as, 637, 447.

## INDEX

### LEX FORI,

- governs remedy, 12.
- may govern Statutes of Limitations and Frauds, 12, n. 2.

### LIABILITY,

- of maker, drawer, indorser, &c., of note, what law governs, 12 (7).
- of cashier to bank, 172.
  - cashier as trustee, 173.
  - cashier for subordinates, 172 a.
  - not obliged to examine every entry, 172 a.
  - director's order will not excuse, 172 b.
- of president,
  - to the bank for breach of trust, 147.
  - for passing bank's money to an irresponsible person, 147 a.
  - for selling property without authority, 147 b.
- of directors,
  - for over-issue of notes, 128.
  - to shareholders for gross negligence, fraud, or breach of organic law, 717.
  - dissenting director may avoid, 128.
- of officer is assets of the bank, 144 i, 717 c.
- of officers receiving deposit, knowing of bank's insolvency, 628.
- of bank on a check depends on facts, not form, 154 c.
- to forfeiture, 761.
- for wrongful act of officer, 79, 89, 94, 95, 97, 98, 102, 126, 132, 171.
  - beyond his sphere bank not liable, 195 b.
- in case of adverse claims to a deposit, 341.
- arising from collections. See COLLECTION.
- for special deposit, see DEPOSIT, 3.
- for specific deposit, 210-212.
- for general deposit, 179, 289.
- of a subscriber for bank stock, see SHAREHOLDERS.
- of shareholders beyond subscription, see SHAREHOLDERS.
- of shareholders in national bank, II. 12 b.
- limit of, one person or firm, II. 29, 229.
- of executors, trustees, etc., II. 63.
- of banking associations, extending existence, II. 70.
- of stockholder arises only in case of liquidation, II. 212 b, n.
- of stockholders who do not assent to liquidation, II. 212 b.
- of stockholders is secondary, II. 212 b.
- of stockholder in national bank is several, not joint, II. 212 b.
- of stockholder, fixed by his taking stock, II. 212 b.
- of trustee who is also stockholder, II. 212 b.
- Comptroller decides when to enforce, II. 212 b.
- may be enforced by a creditor's bill, II. 212 b.
- of shareholders in insolvent banks, II. 250 d.
- of each shareholder is several, II. 250 d.
- of directors, II. 253.
- Rev. Sts. 5239, applies only to violations of the banking law by excess of authority, etc., II. 253.
- State bank does not escape, by change to national bank, II. 244 a.

### LIEN,

- on deposit,
  - term inaptly applied, 324, n.

**LIEN — Continued.**

on deposit — Continued.

when accrues, 324.

may be controlled by special agreement, 324, n.

on what and for what the lien attaches, 324.

discount on faith of goods, 324 *a.*

none, on securities accidentally in bank's possession, 324 *c.*

none, on funds coming into possession of bank after death of depositor, 324, n.

none, on money in bank's possession through inadvertence or mistake, 324, n.

none, on money in borrower's hands if it has become a part of his estate, 324, n.

none, on note sent to bank for discount and credit, 325 *a.*, n.

lien on special and specific deposits, 325.

bank has, on paper indorsed to it "for collection", 576.

proceeds of collection, 324 *b.*

surplus from sale of collateral, 325 *a.*

on pledge, 325 *a.*, n.

trust deposit, 326.

symbolical pledge, 324 *d.*

the claim and the property must be due to and from the same two funds, 326.

funds of principal not applicable to agent's debt, 326.

funds of firm not applicable to individual partner's debt, 326.

overdraft of prior firm, 326.

money not belonging to depositor, 326.

several accounts in same right, 327.

bank may combine the accounts in same right, kept in its various branches, 327.

money received by depositor for use of bank may be charged to him on general account, 328.

lien for immature debt, 329.

none at law, 329.

equity will give, if there is danger of loss, 329.

loss of, 330.

bank estopped to assert, 331.

by bad faith, or notice of adverse claim, 331.

particular and general, and their effect, 323.

general, not favored, 332.

Pennsylvania rule, antecedent consideration, 333.

on shares,

none at common law, 697.

nor in any manner in case of national banks, 9, n. 11, II. 212.

may exist by usage known to debtor, 697.

in virtue of by-law, 698.

by provision in articles of association, 698 *A.*

good, except in case of national bank, 698 *A.*

exists for immature as well as mature debt, 702.

cannot be apportioned, but affects the debtor's shares as a whole, 705.

transfer in derogation of a valid, is void, 699.

no lien for debt created subsequent to a known transfer, 699.

bank postponed as to the creditor's other property, 700.

**LIEN — Continued.**

- on shares — Continued.
  - waiver and loss of, 701.
    - by taking further security unless lien is reserved, 701, 704.
  - subrogation of surety to bank's lien, 703.
- on dividends, 699 *e*, II. 35, 212, 235.
- savings bank depositor's lien, 618.
- Statute of Limitations does not affect, 701.
- United States has first and permanent, on all assets of national bank, II. 250 *c*.

**LIMIT,**

- of director's discretion, 127.
- debt beyond legal, 128.
- loan beyond legal, 128.
- of issue of notes under five dollars, II. 22 *b*.
- of circulation of certain banks, II. 22 *c*; repealed, § 76.
- to aggregate circulation, II. 22 *d*; repealed Jan. 14, 1875.
- of liability of one person of a firm, II. 29, 229.
- to bank's indebtedness, II. 36.
- of liability of stockholder, the par value of stock, II. 212 *b*.
- but one, to taxing power of State, II. 241.
- purpose of Congress in fixing, to State taxation, II. 241 *y*. See restrictions of banking powers, 69-71.

**LIMITATIONS. See STATUTE.**

**LIQUIDATION, VOLUNTARY,**

- effect of, 622 *A*, *n*.

**LOAN,**

- restrictions on making, 67 *n*, *o*.
- on personal security is good, though mortgage is also taken, 75 *d*.
- director must not act at the granting of, to self, 125.
- beyond legal limit, liability of directors for, 128.
- ignorance no excuse, 128.
- power of cashier to negotiate on behalf of bank, 160.
- to cashier, 173.
- deposit by customer is a, to bank, 229.
- by overdrafts, 357.
- ultra vires*, may be recovered, 753, 755.
  - only sovereign may object, II. 289.
  - may cause forfeiture, 761.
- to subscribers of the amount of their subscription, is fraud, 761.
- on stock prohibited to national banks, II. 35.
- limit of, by national bank, to one firm or person, II. 29.
- greater than one tenth capital forbidden, II. 229.

**LOAN, TRUST AND INVESTMENT COMPANY,**

- distinguished from bank, 767.
- legislature may prescribe rules for their regulation, etc., 768.
- incorporation of, by express statutes or a general law, 769.
- cannot merge, in the absence of statutory authority, 770.
- stockholders of, liable for debts of, 771.
- officers and agents,
  - powers and duties of, 772.



## INDEX

### LOAN, TRUST AND INVESTMENT COMPANY — Continued.

- officers and agents — Continued.
  - representations of, 773.
  - knowledge of, 774.
  - liabilities of, 775.
- criminal liability of, 776.
- powers of, determined largely by statute, 777.

### LOCATION. See PLACE.

- of bank is place named in organization certificate, 46 *f*.
- legal home of bank is in State where created or located, 46.
- national bank may change, II. 81.

### LOSS,

- arising from innocent mistake of officer, 23.
- of certificate of deposit, 306.
- of lien,
  - on deposit, 330.
  - on shares, 701.
- of check, 395 *A*.
- of bank bill,
  - complete, 649.
  - partial, 650.

## M

### MAIL,

- presentment of check by, 427, 427, *n.*, 436.
- transfer of check by, 395.

### MANAGEMENT,

- of bank may be divided among several boards or committees, 115.
- belongs to directors, 116.
- daily routine no part of, 118.

### MARRIED WOMAN,

- checks, payment of, 434.
- liability of, as stockholder, II. 263.

### MEASURE OF DAMAGES. See DAMAGES.

### MEMORANDUM CHECKS,

- presentment and notice waived by writing "mem." on a check, 388.
- as between bank and payee, they are ordinary checks, 388.

### MISTAKE,

- money paid by, may be recovered, and usage to the contrary is bad 9, *n.* 9,
- certification by, 419.
- in writing checks, 444.
- no presumption of, 454.
- in paying checks. See CHECKS, 7, 8.

### MISUSER,

- of franchise, a cause of forfeiture, 761.

### MODE OF DEALING,

- between parties, effect of, 9 *e*.
- varying the rule that only money may be taken by agent, 247 *a*.

**MONEYED CAPITAL,**

meaning in reference to taxation fully discussed, II. 241 *y*.

**MORTGAGE.** See **REAL ESTATE.**

may be given by bank as security, 63.

cashier may sometimes discharge, 159 *a*.

can properly be taken by national bank on real estate only for debt previously contracted, II. 228.

but though in excess of bank's power, is good between the parties, 74-76.

*contra*, 747.

good if for previous debt, though the note is concurrent, 75 *f*.

good if to third party in trust for national bank, 75.

given to bank may be foreclosed by its successor, 144 *c*.

of personalty to national bank, II. 208 *f*.

**MOVABLES,**

effect of contracts upon, 12, n. 9, 10.

**MUTILATION,**

of bank bills, 650 *a*, II. 24.

**N**

**NATIONAL BANKS,**

synopsis of national banking laws, in the order of the Rev. Sts. with reference to the sections of this book, II. 0.

definition of, 2-5.

have only the power that Congress gives, 7, n.

are under the permanent authority of the United States, II. 200, n.

are instruments of national government, II. 200.

use of the title "national", II. 54.

presumed knowledge of the corporate powers of other national banks, II. 200 *a*.

protected from State legislation or procedure, II. 200, n., 241, 257 *a*.

depositories of public money, 48, II. 45, 245.

except custom receipts, II. 83 *G*.

exemption not applicable to Hawaii, Alaska, etc., II. 83 *G*.

wishing to consolidate with another, II. 42 *d*.

change of State banks to national, II. 44, 62, 65, 244.

of name and location, II. 81.

limit of bank's indebtedness, II. 36.

penalty for violating the banking laws, II. 53.

visitorial powers over, II. 54.

does not include escheat of unclaimed deposits, II. 54, n.

does not include examination of books of account and loans, II. 54, n.

effect of taking illegal security, II. 208 *e*. See *ultra vires*.

pledge of personal property to, II. 208 *f*.

right to act as trustee, II. 208 *b*<sup>1</sup>.

right to act as assignee of judgment, II. 208 *b*<sup>2</sup>.

voluntary liquidation, II. 242.

attachments, II. 257 *a*.

injunctions against officers, II. 257 *b*.

removal of suits, II. 257 *c*.

criminal cases, II. 259.

NATIONAL BANKS—Continued.

- existence may be extended, II. 67, 83 H.
- may attach shares of its own stock, II. 212.
- may hold back dividends as offset to debt, II. 212.
- continues to exist after appointment of receiver, and may be sued in its own name, II. 250 *a*.
- a national bank is a citizen of the United States, II. 83 A.
- a national bank is a citizen of State where located, II. 206.
  - located in one State cannot keep office in another, II. 257.
- examination of, by Comptroller, II. 69.
- agent,
  - decision as to whether receiver or agent shall wind up business, II. 83 D, 83 E.
  - if elected, to be bonded, II. 83 D, 83 E.
  - powers and duties, II. 83 D, 83 E.
  - selection of successor, II. 83 E.
  - may sue as representative of other bank when, 56, *n*.
- banks of issue, II. 230 *z*.
- bonds,
  - deposit of, to secure circulation, their transfer, registry, exclusive custody, examination, etc., II. 16, 19, 20, 25, 26, 74-76, 216.
  - cancellation of, II. 47.
  - sale of, II. 48, 49.
  - exchange of  $3\frac{1}{2}$  per cent for 3 per cent registered, II. 77.
- business,
  - right to begin, determined by Comptroller, II. 17.
    - certificate of authority to begin, II. 12.
  - place of, II. 8, 208 *g*.
  - cannot move from suburb to city without complying with Comptroller's conditions, II. 208 *g*.
  - continuance of, after default, II. 46.
  - cannot act as trustee, II. 208 *b*<sup>1</sup>.
- capital of,
  - amount of, II. 7, 83 F.
  - payment of, II. 14.
  - delinquent shareholder, II. 15.
  - increase of, II. 13, 81, 213 *a*, *b*, *c*.
  - reduction of, II. 13, 213 *d*.
  - shares, II. 12.
  - withdrawal of, prohibited, II. 38.
  - enforcing payment of deficiency, II. 38.
- capital stock of,
  - does not include its general deposits, II. 12 *a*, *n*.
- Comptroller, of, II. 201, 202.
- directors of,
  - election of, II. 9, 10.
  - qualification, *ib*.
  - oath, *ib*.
  - vacancies, *ib*.
  - failure to elect, *ib*.
  - liability of, II. 53, 253.
- dividends, II. 33.
- insolvent, II. 246.
  - distribution of assets, II. 250 *c*.

NATIONAL BANKS—Continued.

insolvent—Continued.

U. S. has prior lien, II. 250 *c*.

claim bears interest from time of approval, or entry of judgment,  
II. 250 *c*.

preferences, II. 252.

attachments against, II. 52, 252, 257 *a*.

interest, rate of, II. 30, 230.

conflict of laws as to, II. 230 *e, f*.

jurisdiction of suits involving, II. 257.

lien on shares and dividends, II. 35, 212, 235.

loan,

limit of, to one firm or person, II. 29.

on stock prohibited, II. 35.

beyond limit, only sovereign can object, II. 229.

not forbidden to loan on deed of trust, 75, II. 228 *b*.

not forbidden to loan on stock in usual course of business, II. 228 *c*.

notes,

deposit of bonds to secure, II. 16.

increase or reduction of this deposit, *ib*.

exchange of coupon for registered bonds, *ib*.

transfer and registry of bonds, II. 19, 20.

examination of bonds, II. 20, 25.

custody of bonds, interest on, II. 26.

except the five per centum to be recovered into the treasury,  
II. 83 B.

delivery of, II. 21, 76.

printing, denomination, form, II. 12.

plates and dies for, II. 41.

issue of other than national bank notes prohibited, II. 23 *b*.

limit to issue of, under five dollars, II. 22.

limit to circulation, II. 22.

increase or reduction of circulation, II. 75.

apportionment of, II. 22.

removal of bank to another State for, II. 22.

for what demands to be received, II. 23, 32.

issue of other notes prohibited, II. 23.

mutilated and worn, II. 24.

gold, II. 24, 65, 78.

associations organized, II. 24, 65.

reserve and duty to receive notes, II. 24, 78.

banks may become currency banks, II. 65.

penalty for issuing to unauthorized banks, II. 27.

penalty for imitating or defacing, II. 27, 59.

redemption of,

place for, II. 32, 83.

deposit for, etc., in case of dissolution, II. 42, 43.

when existence is extended, II. 72.

assessment for, II. 74.

without signature or with forged signature, II. 83 C.

restriction on use of, II. 37.

restriction on use of notes of other banks, II. 39.

of U. S. not to be used as collateral, II. 39, 78.

retirement of, forbidden, II. 64.

NATIONAL BANKS—Continued.

notes—Continued.

- protest of, II. 46.
- disposal of protested, II. 47.
- cancellation of, II. 47 *b*.

officers,

- directors and president, II. 9, 10, 209.
- election of directors, II. 9, 10 *a*.
- qualifications of directors, II. 9, 10 *b*.
- oath required from, II. 9, 10 *c*.
- vacancies, II. 9, 10 *d*.
- failure to elect on proper day, II. 9, 10 *e*.
- election of president, II. 9, 10 *f*.
- U. S. courts have power to enjoin from violating charter, II. 257 *b*.

organization,

- formation, II. 5, 205.
- capital, II. 7, 14, 83 *F*.
- certificate of, II. 6, 7, 12–15, 81, 202, 206.
- acknowledgment of, II. 6.

powers of, 46 *A*, II. 208. See **POWERS**.

president, election of, II. 9, 10.

receiver,

- appointment of, II. 50, 250 *A*.
- suits by, II. 250.
- suits against, II. 250 *a*.
- notice by, to present claims, II. 50.
- injunction on, II. 50.
- fees and expenses of, II. 50.
- duties of, in winding up business, II. 83 *D*, 83 *E*.

reports,

- to Comptroller, II. 34, 66.
- as to dividends, II. 34.
- penalty for failure to make, II. 34.
- tax return and penalty for failure, II. 41.
- verification of bank's returns before notary, II. 66.

reserve,

- what may be counted toward, II. 31, 78, 83.
- cities, II. 83.

shareholders,

- right to vote, II. 11.
- delinquent, II. 15.
- liability of, II. 12, 212 *b*, 250 *d*.
- executors of, not personally liable, II. 63.
- list of, II. 40.
- dissenting to extension of bank's existence, II. 71.

suits involving,

- conduct of, 56.
- jurisdiction of District and Circuit Courts, 57, 70, 82.
- removal from State courts, 57.
- proceedings to enjoin Comptroller, 57.
- winding up of bank's affairs, II. 82, *n*.
- national bank can be sued only in its district, II. 257.
- may sue in another State like any individual, II. 257.

## INDEX

### NATIONAL BANKS—Continued.

#### taxation,

exemption, II. 41.

duties to United States, II. 41, 77, 80.

tax return, II. 41.

refunding excessive, II. 41.

State, II. 41.

on bank capital, deposits, checks, drafts, orders, vouchers, repealed, II. 80.

transfers, void for unlawful preference, II. 52.

### NATIONAL COURTS. See JURISDICTION, CONFLICT.

### NEGLIGENCE,

liability of bank for, 252.

of depositor, 254.

in certification, 419.

in paying checks. See CHECKS, 7, 8.

in case of forged checks. See CHECKS, 8.

in answering questions about a check without the usual examination of bank books, is a question to go to the jury in case of a check raised before certification, 482 *e.*

in respect to special deposit. See DEPOSIT, 3.

as a cause of forfeiture, 761.

usage may determine the question of, 9, n. 16.

of directors, 128.

of officer, as affecting his bondsmen, 24.

### NEGOTIABILITY,

usage as to, 9, n. 9.

pass-book has no, 290.

of certificate of deposit, 299.

in current funds, 299.

of checks, 374.

part of a bank bill has no, 650.

*contra*, 650, 651.

### NEGOTIABLE PAPER,

may be given by bank for loan, 63.

bank may indorse or guarantee, 65.

### NON-USER,

a case of forfeiture, 760 *a*, 761.

### NOTARY,

duty of, 228.

liability of bank for, 264.

duty of bank in selecting, 266.

### NOTES. See BANK BILLS and NATIONAL BANKS.

payable at particular bank, usage of bank binds maker and indorsers, 9 B.

payment of. See PAYMENT, 2.

purchase of, by bank, held to pass title, 73.

*contra*, 72, 752.

unlawfully issued, bank may be liable for, 98 *l.*

sureties on, cannot be released by cashier, 169.

payable to cashier, 170.

## INDEX

### NOTES—Continued.

- cashier's authority over, belonging to bank, 169.
- application of deposit to pay,
  - bank's right as to maker, 559.
  - when maker can compel bank so to apply deposit, 560.
  - duty as to indorsers. See PAYMENT, 2.
- payable in bank bills, 642.
- given to bank for stock, valid in favor of creditors of bank, 719.
- given to deceive Comptroller may be enforced, II. 31, n. 229.
- held void for usury, 746.
  - contra*, 753.
- protest of, II. 46.
- discounted, taken by national bank from its predecessor is not within R. S. 5200, as given for money borrowed of a national bank, II. 244 *k*.

### NOTICE,

- by bank, that it will not pay on part of a bank bill, is of no effect, 651.
- what law governs, 12 (7).
- usage as to, 9, n. 9.
- of dishonor, 261, condensed statement.
  - of check through mail, 231.
  - collecting bank to notify its immediate principal, 232.
  - whether other parties? 232.
  - time of, 232 *b*.
  - manner of, by mail or otherwise, 233.
  - waiver of, 234.
  - excuse for failure to give, 232 *c*, 234 *a*.
  - condensed statement, 262, 263.
  - by one whose liability is fixed, enures to the benefit of all, 428.
  - time for, cannot be enlarged by taking check instead of money, 428.
  - when residence is unknown, 428.
- of usage, how far necessary, 9, 221.
- of default, 38 *A*.
- of forgery, 487–489. See CHECKS, 8.
- to officers in general, 104.
- to director, effect on bank, 133.
- to cashier, 166.
  - received away from bank, 168 *c*.
- of transfer of bonds to bank, II. 19 *c*.
- of intent to dissolve, II. 42 *b*.
- to bill-holders, II. 47 *b*.
- to present claims, II. 50 *b*.
- delivery of, to bank, 9, n. 9.

## O

### OATH,

- of Comptroller, II. 1 *c*.
- required from directors, II. 9 *c*.

### OFFICER OR AGENT. See NATIONAL BANK.

- general principles, 80 *et seq*.
- what may be intrusted to, 81, n.

OFFICER OR AGENT—Continued.

- when agent's act is that of the bank,
  - as between bank and agent, 83.
  - and sovereign, 84, 760, 762.
  - and surety on officer's bond, 85.
  - and third persons generally, 86.
- representations, 103, n.
- notice to, 79, 104–112.
- competency of, as witnesses for bank, 113.
- contractual acts of, 79, 87–101.
- tortious acts of, 79, 102, n.
- de facto*, 98 *b*.
- usage affecting powers of, 9, n. 9.
- election and qualification of, 16, II. 9 and 10.
- directors, 114, II. 9, 209.
- president, 143.
- cashier, 151.
- functions inherent in, 98 *c*.
  - may be defined and limited, 98 *g*.
  - effect of secret limitation, 98 *g*.
- assumed to possess powers and functions customarily pertaining to the office held, 98 *f*, *h*, *l-n*, 171 *d*, *e*.
- implied authority of, by long continued permission or usage, 98 *l*.
- may bind bank beyond sphere of duty, 98 *f*.
- unauthorized act may be ratified, 101.
- bank not liable for wrongful or tortious acts beyond the officer's sphere, 79, 195 *b*.
- liability of bank for acts of, 79, 89, 94, 95, 97, 98, 102, 126, 132, 171, 195 *b*, 199.
- delinquent, may be released from liability to bank by directors, 119.
- acting wrongfully must be removed, 126 *a*.
- not liable to holders of circulating bills for malfeasance, 657.
  - at any rate protected by limitation, 657.

OFFICIAL BONDS,

- power to take, inherent in bank, 17.
- purpose, 17.
- questions arising on, 17.
- summary of the chief points concerning, 17.
- liability of surety, general principle, 17 *a*.
  - difficulties, directors order to do wrongful act, 17 *a*.
  - increase of salary, 17 *a*, 31.
  - of duties, 17 *a*, 30.
  - of capital of bank, 17 *a*, 32.
- defences of surety,
  - summary of, 18.
  - fraud or illegality in inception of bond, 21.
    - what facts directors must disclose, 21, 21 *c*.
    - concealment, 21 *c*, n.
    - untrue statements, 21.
    - misrepresentation by directors in corporate reports, 21 *b*.
    - misrepresentations as to examination of books, 21 *b*, n.
    - non-compliance with examination of books, 21 *a*, n. 8 *a*.
    - when no defence that others do not sign, 21, n. 4.



OFFICIAL BONDS — Continued.

- whether a director can be a surety, 21 *a*.
- form of, 19.
- delivery and acceptance, 20.
- loss by act of another than the bonded officer, 22.
  - innocent mistake, 23.
  - negligence of officer, 24.
  - act in excess of authority, 25.
  - ratification by bank of such acts, 25 *a*.
  - unusual employment of officer, 26.
    - sending clerk as messenger, 26.
    - constituting the receiving teller a general teller, 26.
    - book-keeper acting as teller, 26.
    - the question is, did the outside employment *cause* the loss, 26.
  - act beyond the period of the bond, 27, 27, *n*.
    - conflict on the question whether legislative renewal before actual termination of the charter keeps the bond alive, 27.
  - condition of, controlled by recital, 27, *n*.
  - act partly beyond the bond period, 27 *b*.
    - taking a new bond terminates the old, 27 *a*.
- change in relation of bank and officer, 28.
- change in identity of firm, 29.
  - duties of officer, 30.
    - lower grade duties, 30.
    - higher grade duties, 30.
  - salary of officer, 31.
  - capital of bank (conflict), 32, 17.
- unreasonable retention of officer after discovery of his default, 33.
  - no fault or connivance of directors can discharge surety as to default of officer within the employment contemplated by the bond, 33 and notes.
  - negligence of directors in supervision, 37, 38.
- when bank has received satisfaction for loss caused by officer, 34.
- Statute of Limitations, 35.
- revocation of, by surety, 36.
- notification of default, 38 *A*.
- ultra vires* action by bank, 39.
- failure of officer to take oath, 40.
- express limitation of amount of risk, 41.
- measure of damages, evidence, etc., 42.
- construction of, in general, 17, *n*. 3.
  - "well and faithfully" to discharge, "well and truly", 24.
  - "well and truly to perform duties to best of abilities", 24.
  - "deliver to his successor all moneys", etc., 23.
  - "perform all duties of office which the directors may prescribe", 26, 30.
  - "faithful discharge of trust reposed in him as assistant book-keeper", 25.
  - "immediate notice", 38 *A*, 42 (*d*).
  - express limitation of the maximum sum to be intrusted to clerk, 44.

## INDEX

### ORGANIZATION,

of bank, 14.

by charter, 14.

under general law, 14.

number of members, 14.

amount of capital, 14.

mode of paying it in, 14.

evidence of, 14 *a*.

certificate, 14, II. 206 *a*.

conclusive evidence of organization against stockholders and  
creditors, II. 206 *a*.

### OVER-DRAFTS,

are irregular loans, 357.

cannot be reported as a loan, 357, *n*.

usage for officer to allow, is bad, 357.

directors may allow, 358.

cashier and president may allow, 358, *n*.

may be a fraud on the payee, 359.

bank may recover from drawer, 360.

### OVER-PAYMENT,

by mistake, 454.

## P

### PARTNERS,

checks drawn against deposits of, 439.

shares of, held for debt of firm, 703.

### PASS-BOOK. See Books.

### PAYMENT,

(1) of checks. See CHECKS, 7.

forged. See CHECKS, 8.

(2) of notes and acceptances,

president may guarantee, 65.

note or acceptance payable at the bank, 557.

duty of bank, various rulings, 557.

advance of the amount by the bank, 558.

what amounts to, 557, *n*.

note held by the bank,

as to maker, bank not generally obliged to apply deposit on  
note, 559, *n*.

may do so, however, 559.

unless the deposit is specific, 561, *n*.

unless it holds the deposit under an agreement incon-  
sistent with such a right, 562 *b*.

maker may insist on it in case of bank's insolvency, 560.

not yet due, retention of deposit, 561.

indorsers discharged by bank's failure to apply existing de-  
posit to note, 562.

*contra*, 563.

otherwise, as to subsequent deposits, 562 *a*.

or if the bank has no right so to apply the deposit,  
562 *b*.

## INDEX

### PAYMENT — Continued.

#### (2) of notes and acceptances — Continued.

as if the deposit is specific, or there is an agreement or order inconsistent with such application, 562 *b*, 564.

if money is deposited to pay a note, the holder may sue the bank, 564 *a*.

*contra*, 564 *b*.

through the clearing-house, 353.

#### (3) of deposit. See DEPOSIT.

#### (4) of subscriptions, to whom must be made, 98 *j*.

#### (5) made to paying teller held good, 98 *j*.

#### (6) by certificate of deposit, 304, 305.

by check. See CHECKS, 9.

by bank bills, 637.

#### (7) place of, usually decides validity of contract, 17 (7).

### PENALTY,

in restraining acts, 13.

for issuing notes below a certain denomination, 666.

for imitating, defacing, or wrongfully issuing bank notes, II. 27.

for false certification, II. 55, 79, 259.

for violating national banking laws, II. 53.

for failure to make returns, II. 41.

for failure to pay duties, II. 41.

for exaction of usurious interest, II. 230.

### PERSONALTY,

may be mortgaged to bank, II. 208 *f*.

cashier controls bank's, 157.

### PLACE,

where casual contract is made is its seat, 12 (7).

of delivery of note is the place of contract, except as to parties without notice, 12 (7).

of payment may decide rate of interest, 12, *n*. 15.

of making contract may decide rate of interest, 12, *n*. 15.

of suit as to interest may decide rate of interest, 12, *n*. 15.

bank's legal home is in State where created or located, 46.

bank cannot take franchises into another sovereignty, 46.

bank may do business in another State through agents, 46.

bank may buy bill of exchange in another State, 46 *a*.

bank may hold land in another State, 46 *c*.

cannot issue bank note in another State, 46 *d*.

nor have an agency for deposit there, 46 *e*.

place of national bank is the locality named in organization certificate, 46 *f*.

checks may be drawn away from bank, 168 *b*.

indorsement elsewhere held good, 168 *c*.

bank must not pay or certify checks, nor in general give information, away from the bank, 168 *d*, *h*.

deposits must be received at bank, 168 *f*.

the test is, can the business be as well done away, 168 *a*.

ratification of acts done away from bank, 168 *g*.

PLACE — Continued.

- of performance governs validity of contract, 12 (7).
- of payment usually decides validity of contract, 12 (7).
- for redemption of notes, II. 32.
- for transacting bank's business, 46, II. 208 *g*.
- restrictions on bank as to, 69 *a*.
- restrictions on bank as to transfer of, II. 208 *g*.
- where bank is located is construed to mean "State", II. 41, 241 *l*.
- of presentment, see 230, 258, 259 *b*.

PLEADING. See OFFICIAL BONDS, 42.

PLEDGE,

- cashier may give, 160 *b*.
- cashier has no inherent power to pledge bank's property for antecedent debt, 169.
- of bank bills, the identical bills to be returned, 663.
  - pledgee under agreement not to put in circulation is not entitled to rights of a bill-holder, 663.
- of United States notes, not lawful, II. 39.
- of stock to A. makes him liable as a shareholder, if his name appears on the books of the bank, 680.
  - not otherwise, 684.
- of personal property to national bank, II. 208 *f*.

POSSESSION,

- of bank bills *prima facie* evidence of title, 652.

POST NOTES, 636.

POWERS,

- of officers. See AUTHORITY.
- of the bank limited by charter, 6, n. 4.
  - history and usage proper guides as to, 47 *a*.
- ancillary,
  - to sue and be sued, 15.
  - to have a corporate seal, 15.
  - to have perpetual succession, 15.
  - to appoint and qualify officers, 15.
  - to make by-laws, 15.
  - to increase or reduce capital, 15, II. 81.
- business,
  - to receive deposits, special, specific, and general, and give security therefor, 47, n., 48, 191.
  - to loan money on real and personal security, 48, 74-76, II. 8, 29, 228, 229.
  - to buy and sell exchange, coin, and bullion, to sell its property, to deal in checks, and to purchase bills and notes (?), 49, 71 A, 72, 73.
  - to discount, 50.
  - to give certificate of deposit, 51.
  - to act as agent in some financial dealings, 52.
  - to issue bank notes, 53, 634.
  - incidental, II. 208.
    - must be essential to business, 54.
    - dealing in real estate, 55, 74-76, II. 28, 228.
    - taking by bequest, 55.

POWERS — Continued.

of the bank limited by charter — Continued.

- making contracts, 56.
  - test of bank's power, 56.
  - may settle claims, 57.
  - take goods on credit, 58.
- may hold cattle as pledge for payment of over-draft, 56, n.
- may represent other banks in suing on notes, 56, n.
- may deal in government securities, 59, II. 208 *a*, *b*.
- how far dealing in other stocks is allowable, 59, 77.
- to save debt, 60, 77, 78.
- to employ surplus capital in outside business, 61.
- to alienate property, 62.
  - gift, 62.
- to borrow on time, 63.
- to draw checks, 64.
- to indorse paper, 64.
- to give guaranty or warranty, 65.
- to keep dividends to form a surplus, 66.
- to abandon part of franchise, 67.
- restrictions on,
  - express,
    - time, place, traffic, debts and loans, real estate, interest, circulation, capital, 69.
    - form of contract, 70.
  - common law, 71.
- bank cannot be surety where it has no interest, 65.
- indorse or accept for accommodation, 64, 65.
- make contract of partnership, 53, 56.
- contract for a railroad, 56.
- enter creamery business, 56, n.
- deal in merchandise, 56.
- contract for building bridges, 56.
- of national bank, 46 A, II. 8.
  - incidental powers, II. 208.
    - to deal in stocks and bonds, II. 208 *a*.
    - to deal in United States government bonds, II. 208 *b*.
    - to deal as a trustee, II. 208 (*b*<sup>1</sup>).
    - to act as assignee of a judgment, II. 208 (*b*<sup>2</sup>).
    - to hold security for others, II. 208 *c*.
    - to take personal property in pledge, II. 208 *f*.
- of stockholders,
  - to make by-laws, 43.
  - to increase capital, 14, II. 13 *a*, 81, 213 *a*, *b*, *c*.
  - to dissolve bank, 766.
- of State, to alter or repeal charter, 6, n. 3.
- of bank examiner, 13 A.

PRACTICE. See CHARTER, ORGANIZATION, OFFICIAL BONDS, SUITS.

PREFERENCES. See INSOLVENCY.

PRESENTMENT,

usage varying rules of law as to mode of, etc., good, 9, n. 9.

**PRESENTMENT** — Continued.

- usage of bank known to indorser binds him, 9 A.
- what law governs, 12 (7).
- for acceptance, condensed statement, 258.
- for payment, condensed statement, 259.
  - time of, 229, 240, 242, 245.
    - enlarged by crossing, 245, and varied by agreement, 242.
    - place, 230, 259 b.
- duty of bank receiving paper for collection as to, 213. See **COLLECTION**, 2, 4.
- of draft payable at a future day, 227.
- of checks. See **CHECKS**, 4, 5.
  - for acceptance unnecessary, 404.
  - for payment. See **CHECKS**, 5.
    - by collecting bank, 213.
  - through the clearing-house is a legal, 354.
  - waived by writing "mem" on face of check, 388.
  - by mail, 231.
- of bill of exchange through banker, 231.
- of bank bills, not necessary before suit, 644.
  - unless perhaps when payable at a particular place, 644.
  - but in case of insolvency, is advisable, to gain interest, 645.
  - may be made of a parcel, 645.
  - must be made in bank hours, 647.

**PRESIDENT**,

- authority of, 142-144.
  - may institute and carry on lawsuits, 143.
  - may guarantee payment of certain notes, 65.
  - may receive deposits, 143.
  - may offer reward in certain cases, 143.
  - may take from debtor property incumbered by other debts, 143.
  - may bind the bank by his fraud in certain cases, 143.
  - suits may be conducted in name of, 144 l.
  - control of, over corporate funds, 144 b.
  - cannot release debts, 144 e, h.
  - nor enter into contracts, 144 d, m.
  - nor allow overdrafts, 144 b, n.
  - nor loan money to himself or cashier, 144 b, n.
  - nor extend time to a debtor, 144 c.
  - nor receive anything but money in payment of a non-negotiable note, 144 g.
  - nor discharge himself as debtor, 144 h.
- duty of, to preside at board meetings and give careful supervision to bank's affairs, 143.
- legal proceedings of, may be avoided when his interests conflict with those of the bank, 143 b, n.
- representations, admissions, etc., of, 142-145.
- trustee is to be regarded as, 143, n.
- knowledge of, 142, 146.
- personal undertakings of, for bank's benefit, 149.
- pay of, 150.
- taxation of, 150 A.

## INDEX

### PRESIDENT — Continued.

- liability of one held out as, 148.
- liability to bank, 147 *a*.
- liability to third parties, 147 *d*.
  - for acts of other officers, 148 *A*.
- removable by directors, 123, II. 209.

### PRESUMPTION,

- of knowledge of usage, 9.
- that official bond has been accepted, 20.
- that officer's act is lawful in favor of one without notice, 98 *n*.
- of knowledge on part of directors, 137 *c*.
- of cashier's authority, 165 *b*.
- that a deposit is general, 186.
- that a bank in possession of negotiable paper is a holder for value, 603.
- that a deposit belongs individually to the depositor, 604.
- that, when the legislature prohibits certain contracts, it intends to make them void, 751.
- of national bank's knowledge of each other's powers, II. 200 *a*.
- in favor of regularity of mortgage of real estate given to national bank, II. 228.

### PROCEDURE,

- governed by *lex fori*, 12.

### PROMISSORY NOTES. See NOTES.

### PROOF,

- of usage, 9, notes 1-6, 13.
- burden of, governed by *lex fori*, 12.
- of corporate existence, II. 206 *a*.

### PROTEST,

- condensed statement, 260.
- cashier may authorize, 159 *c*.
- by bank, of paper left with it for collection, 227.
- usage as to, held legal, 9, *n*. 9.
- of notes, II. 46, 246, 252.

### PUBLIC DEPOSIT,

- does not make bank agent of United States, II. 245.
- banks designated for, II. 45.
- national bank must give security for safe keeping of, II. 245.

### PURCHASE,

- bank's power to purchase negotiable paper, etc., 49, 72, 73.
- cashier has inherent power to purchase government bonds, 164.
- bank may not purchase its own stock, II. 35.

## Q

### QUALIFICATIONS,

- of officers, 16.
- of directors, II. 9 *b*.

### QUORUM,

- majority of board of directors is a, 125.
- majority of a, at legal meeting, needed to bind bank, 125.

R

RATIFICATION,

- of unauthorized acts of officer, 101.
- of officer's wrongful act, may render bond useless, 25 *a*.
- of act done away from bank, 168 *g*.
- of payment wrongly made on check, 440 B, 471, 476 *a*.
- of *ultra vires* act, cannot be, 102, n. 6°.

REAL ESTATE,

- effect of contracts upon, 12, n. 4.
- powers of bank relative to,
  - general rule, 55, II. 28, 228.
  - restrictions on, 69 *l, m*.
  - bank may hold enough for the accommodation of its business, 74.
  - may take, to secure debt, 74.
  - organic law usually explicit, 74.
  - power to sell implied from power to purchase, 74.
  - may buy in outstanding title, 74.
  - powers liberally construed, 74.
  - may lease land and construct building thereon, 74, n.
  - may lease part of its building, 74, n.
  - bank may buy, build on, and sell adjoining lots, as a precaution against fire, 74, n., 74 *a*.
  - only the sovereign can object to wrongful purchase, 74 *b*.
  - mortgage for concurrent loan, 74 *c*.
  - Kent's reasoning on statutes, 74 *c*.
- national bank powers relative to, 75.
  - trust deed to third party for national bank good, 75 *b, f*.
  - mortgage to national bank held void, 747.
  - contra*, the *ultra vires* bank may enforce, 754.
  - only sovereign can object in case of wrongful mortgage to national bank, 75 *c*.
  - the note may be concurrent if the *debt* is prior, 75 *e*.
- bank as trustee for, 76.
- buying and selling, not within cashier's power, 169.

REASONABLENESS,

- of banking hours, 45 *a*.
- of refusal to redeem bank notes after hours, 647.

RECEIVER,

- appointment of, 625 O, II. 50 *a*, 250 *a*.
- should not be before notice, 625 O.
- cannot be, in Illinois, before president has received notice to make good the impairment, 625 O.
- by bank commissioner, 625 O.
- by federal court, to entertain suit of non-resident, 625 O.
- effect of, 625 O.
- does not dissolve bank, II. 250 *a*.
- legality of, cannot be inquired into by a debtor sued, II. 250 *a*.
- but bank may move to set aside, II. 250 *a*.
- removal of, when dissipated, 625 C.
- injunction on, II. 50 *c*.
- payment of dividends by, II. 50 *c*.
- court may appoint, for insolvent bank, II. 246.



**RECEIVER—Continued.**

- creditor of insolvent national bank cannot sue, II. 246.
- on order of court, may compromise doubtful debts, II. 246, 250.
- bill brought by assignee of bonds against, II. 246.
- bank's assets, books, etc., pass at once into the hands of, II. 250 *a*.
- may sue directors, II. 250.
- may sue in own name to collect assets, II. 250.
- may sue for conversion of notes, II. 250.
- may be sued to recover for a special deposit lost by the bank before its failure, II. 250 *a*.
- may buy real estate, through a trustee to save debt, II. 250 *a*.
- has no greater rights than the bank itself, II. 250 *a*.
- is under direction of Comptroller, II. 250 *a*.
- duty to collect assets, II. 250 *a*.
- duty to distribute assets according to federal law, II. 250 *a*.
- represents, not the government, but the bank, II. 250 *a*.
- decision of, on claim not final, II. 250 *a*.
- is an officer of the United States, II. 250 *a*.
- may bring suit in his own name or bank's, II. 250 *a*.
- cannot maintain suit at law, pending a bill to enforce liability of shareholders, II. 250 *a*.
- cannot sell real or personal property without authority, II. 250 *c*.
- may claim property of bank against an attachment issued between bank's failure and his appointment, II. 250 *a*.
- may stop *in transitu* money sent to pay debt of correspondent, II. 250 *a*, *n*.
- may sell and transfer a claim against a stockholder, II. 250 *A*.
- may employ private counsel with approval of Treasury Department, II. 256.
- has no prerogative right to be sued in United States courts, II. 257.
- may sue shareholders to recover assessments due, II. 257.
- may enforce note given for purpose of deceiving Comptroller, II. 31, *n*.

**RECORDS,**

- to be kept by directors, 161.

**REDEMPTION,**

- of bank bills, 646, 647; II. 32, 42 *e*, 46, 47 *b*, 72.
- place for, II. 32 *a*.
- at Treasury, II. 47 *b*.
- failure in, II. 46.
- assessment for, II. 74.

**REGISTRY,**

- of transfers of bonds, II. 19 *b*, 20.
- of organization certificate, 14, II. 206.

**RELEASE,**

- directors may, a debt due bank, 119.

**REMISSION OF MONEY,**

- part of banking business, 52.
- reasonable charges for, not usurious, 52.

**REMITTITUR,**

- president may enter a, 143 *d*.

## INDEX

### REMOVAL,

- of president or other officer by directors, 123.
- of bank to another State to aid apportionment of circulation, II. 22 *f*.
- of suits, R. S. 640, II. 57, 70, 82, 157 *c*.

### REPORTS,

- annual, of Comptroller, II. 3 *c*.
- to Comptroller, II. 34.
- as to dividends, II. 34.
- penalty for failure to make, II. 34.
- of national banks may be sworn to before notary public, if not an officer of the bank, II. 66.

### REPRESENTATIONS, 79, 103.

- of cashier,
  - as to genuineness of paper, 167 *a, b*.
  - as to past transactions, 103, 107 *c*, 167 *c*.
  - as to payment of note, held to bind bank, 167 *d*.
  - even though cashier was adversely interested, 167 *e*.
  - aside from his duties, do not bind bank, 167 *f*.
  - made away from bank, 168 *d*.
  - as to keeping special deposit, 203.
- of president,
  - made within scope of agency, bind bank, 145 *a*.
  - cannot release debt by admission, 145 *b*.
  - nor charge bank with debt, 145 *d*.
  - by force of usage, his acknowledgment may take a debt out of statute, 145 *c*.
  - not as agent for bank nor in its business, do not affect bank, 145 *e*.
- no individual director can bind bank by his, 103, n. 11<sup>a</sup>, 124.
- declarations and admissions of any officer or agent within the scope of his employment are evidence affecting the bank, 103.
  - relating to past transactions, do not affect bank, 103, 107 *c*.
  - unless they have a present interest, 103.
- of principal in official bond, how far available against surety, 42 *c*<sup>2</sup>.

### RESERVE,

- what may be counted toward, II. 31, 78, 83.
- of gold note banks, II. 24 *c*.
- cities, II. 83.

### RESERVE FUND,

- may be required, 13, n.

### RESTRICTIONS,

- on the right to engage in banking business, 13.
- on authority to certify, 155 *g*, 168 *d, h*.
- on powers of a bank, 68.
  - in regard to real estate, 69, *l, m*.
  - as to rate of interest, 69 *n, o*.
  - as to circulation, 69 *p, s*.
  - as to capital, 69 *v*.
  - as to form of contracting, 70.
  - at common law, 71.
- on use of notes of other banks, 666, II. 39.

## INDEX

### REVOCATION,

- of check,
  - by countermand, 397, 398.
  - by death of drawer, 400.
  - by insolvency, 400 A.
  - power of, ceases when certification is completed by delivery, 399.
- of officer's authority, 100.
- by surety on official bond, 36.

### ROUTINE,

- execution of daily, not a part of management, 118.
- not affected by statute forms for signing contracts, 744.

## S

### SAVING DEBT,

- for this purpose a bank may carry on an iron mill, 78.
- or buy land, or an outstanding title, 78.
- or cut and sell timber, 78.

### SAVINGS BANKS,

- may receive special deposits, 617, n.
- depositors are like stockholders in a commercial bank, 617.
- managing officers,
  - duty of, 617, n.
  - cannot destroy its entity and transfer to themselves its good will, 617, n.
- depositor's lien, 618.
- effect of calling an institution a savings bank, 618.
- pass-book,
  - only shows the state of funds, 619.
  - production of, in drawing deposit, 620 b.
  - lost, 620 d.
  - gift of deposit by transfer of, 608.
- rules and by-laws,
  - part of the contract with a depositor, 620.
  - amendment of, 620 a.
  - payment contrary to, 620 e.
  - as to production of pass-book, 620 b.
- payment of deposit to a foreign administrator, 620 A.
- insolvency of. See INSOLVENCY.
- definition, 3.
- are not included in banks of issue, II. 230 z.
- deposits in, may be exempted from taxation without affecting the right of the State to tax national banks, II. 241 y.
- may be required to turn over inactive accounts to the State officers, 620, n.

### SEAL,

- of the bank, 15.
  - not necessary to valid corporate contract except a contract by deed, 70, n. 1.
- of Comptroller, II. 2.

### SECURITY,

- cashier may give, for money borrowed, 160.
- bank may give mortgage as, 63.

SECURITY — Continued.

- effect of depositing, for redemption of bills, 644, II. 16.
- taking illegal, II. 208 *e*.
- national bank may loan on personal, not real, II. 228.
- non-taxable, II. 241.
- national bank must give, for safe keeping of public money, II. 245.

SET-OFF,

- debts must be due to and from the same funds, 334.
- cannot set off wife's money against debt of husband, 334, *n*.
- must be certain, 335.
- the claims must be money demands, 336.
- in case of insolvency of depositor, 337.
  - of the bank, commercial, 338.
  - of savings bank, 339.
  - of savings and loan association, 339 *A*.
- against debtor's representatives, 340.
- of bank bills, 639-641. See BANK BILLS.
- of debt due shareholder by the bank, not allowed in suit against him by a creditor, or for the benefit of creditors, 691.
- but an assigned judgment in favor of a note-holder may be thus set off, 691.
- dividends are a subject of, 699 *e*, II. 35, 212, 235.
- certified check in, 336 *a*.

SHAREHOLDERS,

- (1) Who is a subscriber, 674.
- (2) Obligation arising from subscription, 668.
  - shifts to avoid it, 669.
  - assessment must be made in conformity to by-law, 668, *n*.
  - notes given for stock, 669, 719.
  - valid in favor of creditors, 719.
  - irregular organization of bank does not affect, 669.
  - nor invalidity of another's subscription, 670.
  - forfeiture of stock for default does not release, it is cumulative, 670.
  - directors cannot release, 671.
  - corporation cannot release without consent of creditors, 671, *n*.
  - subscription induced by fraud, 671, *n*.
  - subscription cannot be rescinded after insolvency of bank, 671 *A*, *n*.
  - discharge in bankruptcy destroys, 671.
  - Statute of Limitations does not run against, so long as bank does business, 672.
  - transfer of right to stock before issue does not discharge, unless the assignee is accepted, 673.
  - failure of an attempted increase of stock, for want of sufficient subscriptions, releases, 670.
  - payments on subscription taken at actual cost to the subscriber, 719.
- (3) Liability of, beyond subscription,
  - by holding themselves out as partners, 675.
  - by statute,
    - measure of, 675 *a*.
    - National Banking Law, II. 12 *b*, 212 *b*.

SHAREHOLDERS — Continued.

(3) Liability of, beyond subscription — Continued.

- law of Massachusetts, 675 *b*.
- law of Minnesota and other States, 675 *c*.
- does not apply to a savings bank, 675 *c*, *n*.
- subsequent to organization, 676.
  - may provide new process to enforce existing liability, 677.
  - must not create new liability unless the right was reserved, 678.
- Statute of Limitations runs from the time the liability arises, 676.
- does not run during concealment from the creditors of the names of those liable, 719 (6).
- who is liable,
  - apparent ownership of stock on the books decides as to creditors, unless appearance is with assent, 679, 681.
  - a national bank is not liable, 679, *n*.
  - a savings bank may be liable, 679, *n*.
  - pledgee liable if his name appears on the books, 680.
  - pledgee not liable otherwise, 684.
  - bona fide* vendee not liable, 679, *n*.
  - transfer of stock does not release, but makes the assignee primarily liable, 682.
  - a colorable transfer does not release, nor a transfer to an irresponsible person, 683.
  - those who are shareholders at the time of suit, 685.
  - estates of deceased holder, 686.
- suits should be in equity (conflict), 693.
  - resort must first be had to the bank, 687.
  - judgment against the bank, does not conclude the shareholder, 688.
  - shareholders cannot maintain a bill to reach unpaid subscriptions, 668, *n*.
  - bank capital may be followed into the hands of a shareholder, 693.
  - interest runs on bank bills from the time of demand on the shareholder, 689.
- defenses,
  - plaintiff not a holder for value, 690.
  - plaintiff's debt *ultra vires* known to him, 690.
  - judgment rendered without jurisdiction, or through fraud, 690.
  - set-off,
    - of debt due the shareholder from the bank not allowed, 691.
    - of an assigned judgment in favor of a note-holder good, 691.
    - amount of recovery, 694.
    - claims bought at discount, 695.
- contribution, 692.
- distribution of funds collected from shareholders, 696 *A*.
- who can sue shareholders,
  - outside creditors, or receiver if authorized, 696.
  - but one shareholder cannot sue another, 696.

SHAREHOLDERS — Continued.

- (4) Rights of,
  - to vote, II. 11.
  - to surplus assets, 706.
  - to assets on reduction of capital stock, 706 A, II. 216 d.
  - to new shares, 707.
  - to dividends, 708.
  - to transfer stock. See STOCK.
  - to enjoin alienation of bank property, 721.
  - to make by-laws, II. 3.
  - to sue officers, 717.
  - to inspect books and records, 708 A.
  - to inspect list of shareholders, II. 40, n.
  - to withdraw from bank extending its existence, II. 70, n., 71, n.
  - to waive provision of statute *in re* stock transfer, II. 212 (a), n.
  - no right to make voting trust agreement, II. 11, n.
- (5) Banks as, of their own stock, 716.
- (6) Sovereign States as, 718.
  - State not preferred to other creditors, 718.
  - nor can legislation give it a preference, 718.
- (7) Directors liable to, 717.
  - quare*, if the receiver should not sue instead of the shareholders, 717 c. See 141 i.
  - for fraud, breach of organic law, or gross neglect, not for mere error of judgment, 717.
  - the liability is individual, 717 a.

See NATIONAL BANKS.

SHARES,

- powers of bank with reference to dealing in, 46 A, 77.
- may be attached by bank, II. 257 a.
- directors must own prescribed number of, 138.
- transfer of,
  - right to enter on the bank books, 709.
  - bank may refuse to allow, until the requisite formalities are complied with, 709.
  - cashier to attend to, 163.
  - purchaser may sue bank for improper refusal, 709, 714.
  - to bank officer as security, 716.
  - an unrecorded transfer takes precedence of a subsequent attachment by a creditor of the assignor, even though the organic law requires all transfers to be on the books, 710-713.
  - contra*, 710, 712.
  - on books of bank, makes transferee (pledgee) individually liable, II. 212 a, 250 d.
  - does not release shareholder from liability, but makes assignee primarily liable, 682.
  - colorable, or to irresponsible person does not release assignor, 683, II. 250 d.
  - "transferable only at bank", and "on surrender of this certificate", 711.
  - mandamus to compel, 720.
  - specific performance of contract to make, not decreed, if the object is to control the bank, 715.

## INDEX

### SHARES — Continued.

#### transfer of — Continued.

national bank shares, etc., II. 12 *a*, 212 *a*.

transferable only on bank books, II. 212 *a*.

#### increase of,

ostensible, must be made good for benefit of creditors, 719 (7).

failure of, 670.

#### national bank, II. 12 *a*, 212 *a*.

lien on, II. 212, 235.

cannot be created by articles of association, II. 235.

must be assessed at full market value, II. 241.

assessment on, by Comptroller, II. 213 *a*; R. S. 5205.

bank cannot loan on its own stock, nor purchase it, except to save debt, 77, II. 35.

transferable only on bank books, II. 212 *a*; R. S. 5139.

See LIEN, CAPITAL.

### SIGNATURE,

bank must know, of customer, 9, n. 9. See CHECKS, 8.

that will bind bank, 154 *a*.

of check, 365, 432. See CHECKS, 7.

of forged check. See CHECKS, 8.

provisions as to, of corporate contracts, 744.

unauthorized, may bind bank, 98 *l*, 722.

### SPECIAL DEPOSIT. See DEPOSIT, 3.

### SPECIE PAYMENTS,

suspension of, as ground of forfeiture, 761.

### SPECIFIC DEPOSIT. See DEPOSIT, 4.

### STALE,

when certificate of deposit is, 303.

when checks are, 441-443.

### STATE,

cannot alter or repeal charter unless power was reserved, 6, n. 3.

decisions do not bind Federal courts on questions of general commercial law, or construction of contracts, or if manifestly unjust, or concern extra-territorial matters, 10, n. 7.

taxation of national banks, II. 241.

consent of, not necessary to change an association to a national bank, II. 244 *k*.

courts have no jurisdiction if receiver of national bank not made a party, II. 250 *c*.

courts not prohibited from attaching property of non-resident banks, II. 257 *a*.

as shareholder in bank, 718.

guaranteeing circulation, 718.

### STATE BANK,

in relation to United States statutes, 7.

in relation to State statutes, 7.

may loan on its own stocks, 59.

may not buy and sell stocks, 59.

while in transition state to become a national bank, is subject to State taxation, II. 241 *s*.

## INDEX

### STATE BANK — Continued.

- bills of, must be received in payment of debt, by successor, II. 244 *f*.
- personal property of, passes to national bank, II. 244 *k*.
- cannot establish a branch unless authorized by statute, 7, n.

### STATE COURTS. See JURISDICTION.

### STATUTE OF FRAUDS,

- whether it belongs to the remedy or not, 12, n. 2.
- as affecting verbal certification, 408.

### STATUTE OF LIMITATIONS,

- runs against a deposit only from demand, unless circumstances exist making demand unnecessary, 322.
- upon certificates of deposit (conflict), 302.
- does not run during concealment of the names of those liable as stockholders, 719.
- nor during fraudulent concealment of cause of action, 454.
- does not run against bank bills until they cease to circulate as money, 643.
- upon certified check, runs from demand, 418.
- does not affect a lien, 701.
- does not run against liability of a subscriber to bank stock so long as the bank does business, 672.
- runs on shareholder's statute liability from the time it accrues, 678.
- does not run upon action of bank against officer, so long as his default is known only to himself, 83.

### STATUTES. See ACTS.

- of United States *v.* State banks, 7.
- of State *v.* State banks, 7.
- of State *v.* national banks, 7.
- of United States *v.* national banks, 7.
- by-laws must not be contrary to, 43.
- of mortmain, 55.
- should be strictly construed, 7, n., 48.

### STOCKHOLDERS. See SHAREHOLDERS.

### SUB-AGENT,

- selection of, by collecting bank, 236.
- the payor is not a suitable, 236 *a*.

### SUBROGATION,

- of surety to bank's lien on stock, 703.

### SUBSCRIPTION,

- must be paid to proper officer, 98 *j*.
- liability of stockholder for, 667.
- what constitutes, 674.

### SUCCESSION OF BANKS,

- the new bank is debtor to the depositors of the old, 320.

### SUCCESSORS,

- in office, control corporate deposit, 440 *A*.

### SUITS,

- by collecting bank, 246.



## INDEX

### SUITS—Continued.

- presentment of check at some time before, is necessary, 425.
  - unless excused, 425 *a*.
- by drawer, for refusal to pay his check, 458.
- against shareholders. See SHAREHOLDERS.
- who can sue shareholders, 696.

See NATIONAL BANKS.

### SUNDAY,

- check dated on, is good, 368.

### SUPERVISION OF BANKING,

- may be intrusted to examiner, 13 *A*.

### SURETIES,

- on official bonds. See OFFICIAL BONDS.
- cashier has no power to release, 169.
- bank cannot be surety where it has no interest, 65.
- whether discharged by failure of bank to apply depositor's balance to payment of his note, 557 *b*, 562, 563.
- paying debt of shareholder to bank, subrogated to bank's lien on shares, 703.
- bound on usurious note, II. 230 *c*.

### SURPLUS,

- capital may be used by bank in outside investment, 61.
- fund, bank may reserve profits to form a, 66.
- fund, powers of directors over, absolute, 116, *n*.
- not excluded in valuation for taxation, II. 241 *p*.
- but may be taxed in addition to the shares, II. 241 *t*.

## T

### TAXATION,

- of national banks, analysis, II. 241; also, II. 41, 77, 80.
- definition of bank for purposes of, II. 4.
- of president, 150 *A*.
- return to treasurer, II. 41.
- penalty for failure to make return, II. 41.
- penalty for failure to pay tax, II. 41.
- refunding excessive tax, II. 41.
- paid bank checks not subject to, II. 300.
- tax payable in bank bills, 637.

### TELEGRAPH ORDER,

- to pay deposit is good, 457 *a*.
- care necessary in honoring, 457 *a*.

### TELLER,

- power of, not exclusive of cashier, 174.
  - to certify checks, 174, *n*. See CHECKS, 4.
- character of office of, 174.
- paying deposit to paying teller makes him agent of the depositor, 174.

### TENDER. See LEGAL TENDER.

- bank bills as, 637.

TESTAMENTARY DOCUMENT,

check as a, 554.

TIME,

bank may begin business, 45, II. 12, 17.  
 restrictions on bank as to beginning business, 69 b. \  
 banking hours, 45 a.  
 limitations of, on cashier's powers, 168.  
 of payment of checks, 369.  
 for which interest is to be cast on general deposit, 309 e.  
 of presentment of negotiable paper, 259.  
 of notice of dishonor, 261.  
 of notice of forgery, 487-489.  
 right to do business ends, 763, 766, II. 46.

TITLE,

to bank bills passes by delivery, 652.  
 is in finder as against all but the true owner, 654.  
 by bequest, 654.  
 to negotiable paper, bank's power to acquire absolute, 72, 73.  
 to land, bank may buy in outstanding, 74.  
 none passes if bank sells its own stock, 77.  
 to bank's residuary interest in bonds, II. 246.  
 transfer of, to check sent by mail, 395.  
 passes to money paid drawer of worthless check, 394.

TITLE TO DEPOSIT,

- (1) In savings bank, 566.  
 in co-operative bank, 566, n.
- (2) Special and specific deposits,  
 preference in case of insolvency of the depositary, 567.  
 a bank transmitting deposit acts as agent, 567 c.  
 proceeds of collection diverted to pay debt of collecting bank,  
 567 d.  
 banks acting as collecting agents for each other, 568 c.
- (3) Money deposited in a commercial bank,  
 coin or currency loose, 568.  
 in sealed package or box, 568 a.  
 not special unless so agreed, 568 b.  
 public deposit blended with bank's funds, 568 b.  
 deposit for transmission, 568, n.  
 proceeds of collection,  
 bank may credit on general account, 568 c, d.  
*contra*, Wisconsin, 568 d.  
 insolvency of the collecting bank revokes the right to credit,  
 568 e.
- (4) Checks on the depositary bank,  
 credited as cash, 569.  
 when holder knows there are no funds, 569 b.  
 New Jersey, 570.  
 New York, 571.  
 Pennsylvania, 572.
- (5) Paper in general deposited in a commercial bank,  
 credited on general account, and drawn against, is assets of the  
 bank in case of its insolvency, 573.

TITLE TO DEPOSIT — Continued.

- (5) Paper in general deposited in a commercial bank — Continued.
  - effect of statement on deposit slip, 574.
  - title passes to bank if credited as cash, N. Y., 574.
  - U. S. C. C., Wallace, J., to the same effect, 575.
  - bank has lien for advances on paper indorsed by the owner to it "for collection", 576.
  - indorsement "for deposit", 577.
  - the best opinion is, that the bank may cancel the credit if the paper is dishonored, 578, 581, 584-586, 587, 662 *d*.
  - a series of courtesies bases no right to demand more, 587.
  - if depositor knows of failing circumstances of the payor, and does not inform the bank, it may cancel the credit, 587 *a*.
  - but as against the depositor the title passes if the paper is credited as cash with his assent, and he draws or is entitled to draw against it, 580, 581, 582, 585 *e*.
  - title does not pass if paper is credited as paper, 583.
    - so if indorsed "for collection", and this is notice of the ownership to all subsequent parties, 583.
    - indorsement "for collection and credit", 583 *c*, *n*.
    - a pension warrant deposited for collection cannot be garnisheed before collection, 583 *f*.
    - bank may elect to credit as paper or cash, 583 *b*.
    - indorsement to bank, effect of, 583 *c*.
- (6) In case of insolvency of depository, 589.
  - if deposit is kept separate, it may be recovered, 589.
  - if mingled, not, even though a trust deposit, 589 *b*, 629 *b*.
  - when deposit made one half hour before bank closes, depositor has a preference, 589, *n*.
- (7) Money not belonging to the depositor,
  - owner may follow as far as he can trace his money into the debt still due from the bank to the depositor's name, 590.
  - owner may recover from a receiver who collects, 590, *n*.
- (8) A correspondent bank can hold paper sent it for collection against the owner if the bank is a *bona fide* holder for value, without notice of the true owner's rights, 591, 592, 595.
  - Michigan, 595.
  - Massachusetts, 597.
  - England, 598.
  - In New York, Pennsylvania, Wisconsin, and Tennessee, one who takes *merely as collateral* for a *pre-existing* debt is not deemed a holder for value in usual course of business, 591.
    - New York, 599.
    - Pennsylvania, 602.
    - this view not approved, 600.
  - brief statement of the law as to what constitutes a *bona fide* holder, 565, *n*. 1.
  - customs of banks among themselves cannot affect depositors (Conn.), 601.
  - presumption is, that bank in possession is a holder for value, 603.
  - "for collection" indorsed on paper is notice of the indorser's title, 593, 594.

**TITLE TO DEPOSIT**—Continued.

- (9) Between third parties,
  - presumption is, that a deposit belongs to the depositor individually, 604.
  - additional titles, as "agent", "trustee", etc., do not overcome this, 604.
  - the name in the bank-book is not conclusive of the title to the deposit, 293.
  - deposit of principal's money in agent's name is loss of the latter, if bank becomes insolvent, 604.
  - deposit to husband and wife, 604 *b*.
  - deposit to children, 604 *b*.
  - deposit to executor who subsequently dies, 605 *e*.
  - deposit to credit of tax collector, 605 *f*.
  - deposit, to order of "A" or "B" does not go to survivor, 604 *c*.
  - deposit, "S., trustee for C. B", S.'s administrator may draw, 604 *d*.
  - assignment of bank-book with notice to bank holds against a subsequent attachment, 604 *e*.
  - specific deposit is the depositor's until the bank pays or is bound to pay it to the payee, 605.
  - before that, it cannot be attached by payee's creditors, 605.
  - bank balance passes by will as "cash", etc., 606.
  - by gift. See **GIFT**.

**TORT,**

- liability of directors for, 130.
- liability of bank for tort of directors, 132.
- of subordinate officer, 132.
- where directors adopt wrongful act of officer, 126.
- director's order will not excuse tort of officer, 172 *b*.

**TRAFFIC,**

- restrictions on bank as to, 69 *c*.
- bank cannot, or speculate in stocks, 77.

**TRANSFER,**

- of shares, cashier to attend to, 163. See **STOCK**.
- of paper by cashier, 158 *a*.
- bank may transfer a note taken to save debt, 78.
- of bonds, II. 19 *a*.
- of stock, II. 212 *a*.
- right to, ends with dissolution, II. 42 *a*, *n*.
- of certificate of deposit, 300.
- of check by mail, 395.
- of pass-book as a gift, 608.
- to cashier, as transfer to bank, 170, *n*. 2.
- to president, as transfer to bank, 144 *l*.

**TRANSMISSION OF MONEY,**

- part of bank's business, 52.
- bank acts as agent in, representing a deposit, 567 *c*.

**TREASURER,**

- tax return made by bank to, II. 41.
- of corporation, power to check. See **CHECKS**, 7.

## INDEX

### TRUST,

- deed to third person for benefit of bank, good, 75 *f*.
- gift of deposit by declaration of, 610.
- no resulting trust in property bought with stolen funds, 173 *a*.
- and life insurance companies exempt from taxation (N. Y.), II. 241 *a*.

### TRUST COMPANY,

- under New York law, not a bank, II. 241 *y*.
- capital must be invested in bonds, mortgages, U. S. stock, etc., II. 241 *y*.

### TRUST DEPOSIT. See DEPOSIT.

- lien on, 326.
- duty of bank in regard to. See PAYMENT, 1.
- mingled indistinguishably with bank's funds, cannot be recovered in preference to other creditors, 629, 630, 589.
- the owner can follow trust property as far as he can identify it, and trace his property to the debt still due the depositor, 590.
- condensed statement of the law as to following property, 565, n. 1.
- payments made from a mixed deposit, will be applied first to the depositor's own funds, though the trust money was previously deposited (conflict), 355.
- proceeds of collection money deposited for a specified purpose, etc. See DEPOSIT, 4, and INSOLVENCY.

### TRUSTEE,

- cashier as, 173.
- directors are trustees, 125.
- bank may be, of real estate, 76.
- bank is not, for general depositor, 289.
- but bank may be, for general depositor, by agreement, in certain cases, 206.
- checks drawn against deposit of, 436.
- liability of, as stockholder, II. 63, 263.
- national bank cannot act as, II. 208 (*b*<sup>1</sup>).

### TRUSTEE PROCESS,

- served on bank as trustee of nominal depositor, 341-343.

## U

### ULTRA VIRES,

- principles of the law applicable to the subject, 723.
- first question is whether the act is that of the bank at all, or of an officer as an individual, 79, 724.
- second, is the act *ultra vires*, 725.
- aside from the transaction in dispute, 726, 752, 758.
- irregular organization,
  - does not affect ordinary business, 726.
  - but a *de jure* existence is necessary to the exercise of privileges, 726.
- is no defense to an action for tort, 727.
- only with reference to the rights of certain persons, 728, 750 *a*.
- such transactions may be ratified, and only the said persons can object, 728.
- internal *ultra vires*, 728.

## INDEX

### ULTRA VIRES — Continued.

- distinction between, and informality, 729.
- always a defense to a suit on an executory contract, 703.
- in contracts executed in part, 731.
  - no action on a contract *malum in se*, or expressly declared void, 732, 746.
  - otherwise in case of legislative intent to deem the contract good between private parties, 733, 750, *et seq.*
  - the plea cannot be set up *for his own sake* by one retaining benefit received under the transaction, 734, 746, 750, 755.
    - for another's sake, 749 b.
  - nor against one who has acquired rights that would be good but for the matter of fact of which he had no notice, 735, 745, 750.
  - in other cases, the plea is allowed, 736.
  - when the bank may set up the plea, 738, 739.
  - when the bank may not set up the plea, 740.
  - burden of proof, 740 a.
  - when the bank can enforce an *ultra vires* contract, 741.
  - discussion of these rules, 742.
  - the true rule allows in general no action directly on an *ultra vires* contract, but only for tort, or on contract implied upon the facts, 742, 747, 756.
- absolute, acts always beyond the bank's power on their face, 735.
- by circumstance, acts not on their face beyond bank's power, 735.
  - known or unknown to the person in controversy with the bank, 735.
- mortgage to national bank held void, 747.
- lawful debts preferred to *ultra vires* debts, in case of insolvency of the bank, 749 b.
- unlawful interest, 746, 750.
- only the sovereign can object, 75 c, 750.
- requiring paper discounted to have two names on it, is for benefit of stockholders, not of one who borrows the money on the note, 750 a.
- statute must be carefully examined to discover if the legislature intended to make the prohibited contract void, 751.
- this intent will be presumed, 751.
- loan tainted with usury or beyond the legal limit may be recovered, 753, 755.
- contract of directors, 127.
- acts of cashier, 171 j.

### USAGE,

- what is necessary to make legally binding, 9.
- great care is necessary in relying on, 9 a.
- the question is, what is it fair to presume the parties intended, 9 b.
- valuable rights not waived without assent, 9 c.
- is extrinsic unless in the nature of contract between other parties, 9 d.
- foreseeing that the bank will be a factor, 9 e.
- mode of dealing between the parties, 9 e.
- actual knowledge of, 9 e.
- general, of the banks of a city, 9 e, n. 21.

## INDEX

### USAGE — Continued.

- of a single bank, 9 *e*, 9, n. 19, 9 A-9 F.
- change of, 9, n. 1 *c*.
- Louisiana definition of, 9, n. 1.
- proof of, 9, n. 1-6, 13.
- cannot be built out of a series of acts, each done under special authority, 97 (7).
- effect of, 9.
  - as against one ignorant of, 9, n. 3.
  - as in favor of one ignorant of, 9, n. 3.
- generality of,
  - only affects question of knowledge, 9, n. 18.
- a usage to perform an act is not equivalent to its performance, 9, n. 17.
- a usage may determine the question of negligence, 9, n. 16.
- held illegal, if against the rules,
  - (1) demand paper has grace, 9, n. 9.
  - (2) bank must pay depositors in good money, 9, n. 9.
  - (3) recovery on one half of bank bill, 9, n. 9.
  - (4) overdue paper subject to equities, 9, n. 9.
  - (5) money paid by mistake can be recovered, 9, n. 9.
- held legal, though against the rules, 9, n. 9.
  - (1) as to demand, notice, or protest, 9, n. 9.
  - (2) as to powers of bank officers and agents, 9, n. 9.
  - (3) that collecting bank cannot receive anything but money, 9, n. 9.
  - (4) that a banker must know signature of customer, 9, n. 9.
  - (5) as to negotiability of paper, 9, n. 9.
  - (6) as to what constitutes delivery, 9, n. 9.
- of a bank binds an indorser who knew of it, 9 A.
- of a bank to forward checks on other banks only once a week, binds one knowing of it, 9 A.
- of a bank binds all who deal with it by drawing or indorsing notes payable at the bank, 9 B.
- of a bank to make demand on fourth day of grace, binds indorsers, whether they know of it or not, 9 C.
- of a bank to give notice by mail, though in same place, binds indorser of note payable at that bank, though ignorant of the usage, 9 D, 232, 233.
- of a bank to devote fifteen minutes after banking hours to presentation of notes, binds indorsers, though ignorant, 9 E.
- evidence of, does not conflict with the rule excluding parol, 9 F.
- what, governs collections, 220.
- local, affects mode of presentment, notice, etc., 223.
- of a collecting bank,
  - to send notice that a note is at the bank, instead of presenting it to the debtor, 231.
  - as to forwarding check by collecting bank, 243.
  - bank liable for deviating from, in collections, 243.
- as affecting liability for a correspondent bank, 270.
- for bank to inquire as to genuineness of checks on another bank, 466 *b*.
- evidence of, as determining the effect of certification, 414 *i*.
- affecting the nature of a deposit, 184.

## INDEX

### USAGE — Continued.

- affecting interest on general deposits, 309 *a*.
- may establish a lien on stock, 697.
- for officers to allow over-draft is bad, 357.
- of banks among themselves cannot affect depositor ignorant of it, Conn., 601.
- to regard transfer to cashier as a transfer to bank, 170, *n*. 2.
- as varying the time of forwarding a check for collection, 242, 243.
- a custom not binding on one who has no reason to suppose he will be brought within it, 9 *e*, 243.
- may give cashier authority to compromise a claim, 159 *e*.
- has given bank power to discount, 50.
- as affecting duty of bank to pay deposit in legal tender, 312.
  - to pay interest on general deposit, 309.
- as conferring powers and duties on bank officers, 98 *a*, *l*, 153 *et seq.*, 165.
- knowledge of, how far assumed, 9, 9 A-9 F, 221.
- can only affect modes and forms, not substantial legal duties, 233.
- cannot relieve bank from essential duty, 9, *n*. 9.
- cannot excuse wrongful use of corporate funds, 9, *n*. 9.
- nor affect legal tender statutes, 9, *n*. 9.
- of bank to allow customer to draw against paper deposited for collection, 583.
- as bearing on the question of grace on draft payable at a future day certain, 387.
- of clearing-house, legal character and effect, 348, 424.
- as affecting presentment and return of checks, 348, 424.
- internal, of bank, may be given in evidence on its behalf by way of corroboration, 295.
- is competent to explain entries in books, 295, 295 *e*.

### USURY. See INTEREST.

- note tainted by, held void, 746.
  - contra*, 750, 753, 755.
- cases on the effect of taking, 746, 750.
- banks subject to laws relating to, except so far as relieved by the custom of discounting, 9, *n*. 9, 50.
- charges for remitting and collecting are not, 52.
- by purchase of note, 72, 73.
- as affected by short "rests" or compoundings, 309.
- as ground of forfeiture of franchise, 760.
- in the case of national banks, II. 30, and see analysis, II. 230.

## V

### VACANCIES,

- among officers of national banks, II. 9, 10.

### VALIDITY,

- of contract governed by place of performance, 12 (7).
- of assessment, II. 241.
- of corporate acts. See ULTRA VIRES, 722.

### VICE PRESIDENT,

- has no duty to give notice of dishonor of paper, 159 *c*, *n*.

### VOLUNTARY DISSOLUTION,

- effect of, 622 A, *n*.



## INDEX

### VOTE,

shareholder's right to, II. 11.

two-thirds, of shareholders required to dissolve bank, II. 42 *a*.

## W

### WAIVER,

of demand for deposit as preliminary to suit for balance, 322.

of presentment of check by writing "mem." on it, 388.

of lien on shares, 701.

by legislature of a cause of forfeiture, 764.

### WARRANTY,

bank may give, on goods sold by it, 65.

by transferrer of bank bills, of the solvency of the issuing bank (?),  
662.

### WITNESS,

who may be, to prove custom, 9, n. 1.

bank officer may be, on behalf of bank, 113, 295.

when shareholder may be a, 113 *b*.



# INDEX TO THE FEDERAL RESERVE ACT

[References in this Index are to Sections in Part II only.]

## A

Acceptance:	
Failure of national banks to signify.....	91, 92
Of terms of act.....	88
Acceptances, bankers'.....	152-154
Acceptances, bankers', acceptable as reserves by Federal reserve banks.....	178
Acceptances rediscounted by Federal reserve banks.....	152, 153
Accommodation extended to member banks.....	105
Accounts:	
Foreign.....	154
With other Federal reserve banks for exchange purposes..	154
Acknowledgment of organization certificate of Federal reserve banks.....	103
Act of March 14, 1900, parity provisions reaffirmed.....	194
Act of May 30, 1908, certain provisions extended, etc.....	195
Additional national-bank circulation.....	195
Tax rate changed.....	196
Additional reserve and central reserve cities.....	140
Administrators, national banks as.....	146
Advancements extended to member banks.....	105
Advisory council.....	148, 149
Agencies, foreign.....	154
Alaska.....	86, 183
Reserve requirements for national banks in.....	183
Aldrich-Vreeland Act, effect on.....	195
Amending section 5154, United States Revised Statutes.....	120
Amendment to section 5202, United States Revised Statutes liability of national banks.....	153
Amount of capital required for Federal reserve banks.....	98
Amount of capital stock required to be subscribed to.....	89
Amount:	
Of Federal reserve bank circulating notes not limited....	171
Of Federal reserve notes that may be issued.....	157
Of gold notes that may be issued to Federal reserve banks	172
Of redemption fund required for Federal reserve notes....	160
Of reserve required for Federal reserve notes.....	158
Of reserve required to be held by —	
Banks elsewhere than in reserve cities.....	175
Central reserve city banks.....	177
Country banks.....	175
Reserve city banks.....	176
Of United States bonds that may be purchased by Federal reserve banks from member banks.....	170
That may be loaned on farm lands.....	192

# INDEX TO THE FEDERAL RESERVE ACT

Annual report of Federal Reserve Board to House of Representatives .....	133
Application for Federal reserve notes .....	157
Application for Federal reserve notes subject to action of Federal Reserve Board .....	161
Application for membership after organization of Federal reserve banks .....	112
Appointment of:	
Employees of Federal Reserve Board .....	147
Examiners .....	185
Members of Federal Reserve Board .....	126
Appropriation:	
For expenses of organization committee .....	100
For expenses of printing Federal reserve notes .....	165
Assessments for examiners .....	186
Assessment on Federal reserve banks:	
To pay cost of Federal reserve notes .....	164
To pay salaries and expenses of board .....	128, 147
Assistants to organization committee .....	100
Attorneys not to receive fee or other consideration other than usual fee or salary .....	190
Authority of Reserve Bank Organization Committee .....	87

## B

Bank:	
Balances, net, to or from to be used in reserve calculations ..	182
Defined .....	85
Examinations .....	185-189
	193
Bank examiners:	
Appointment of .....	185
Gratuities to, prohibited .....	189
Loans to, prohibited .....	189
Powers of .....	185
Salaries of .....	186
Secrecy enjoined of .....	190
Service to banks and their directors, officers, etc., restricted to official duties .....	189
Bankers' acceptances .....	152-154
Acceptable as reserves by Federal reserve banks .....	178
Banks:	
Eligible .....	88, 120
	121, 125
May become national, how .....	120
Not in reserve cities. ( <i>See</i> Country banks.) .....	
Outside continental United States .....	183
Bed pieces for Federal reserve notes .....	164
Bills of exchange:	
Acceptable as reserves by Federal reserve banks .....	178
Acceptable by member banks .....	152
Bought by Federal reserve banks from member banks ...	154
Foreign .....	154
Limit to liability of national banks not to include .....	153
Open-market operations .....	154
Rediscounted by Federal reserve banks .....	151-153
Bills of State and subdivisions thereof dealt in by Federal reserve banks .....	154
Bills receivable, subject to rediscount .....	151-153
Board, held to mean Federal Reserve Board .....	85
May grant, withhold, or withdraw consent to director, etc., to become director, etc., of two other banks .....	199 D

# INDEX TO THE FEDERAL RESERVE ACT

Board of directors of Federal reserve bank ( <i>see also</i> Federal reserve bank directors of).....	105-111
Certificate to be made by, when capital is increased or reduced.....	115, 117
Bond, Federal reserve agent.....	144
Bonds, United States:	
Dealt in by Federal reserve banks.....	154
Hypothecation of, by Federal reserve banks.....	154
National banks not required to deposit prior to commencement of business.....	168
Purchase of, by Federal reserve banks.....	170
Refunding.....	169-172
To secure Federal reserve bank notes.....	104
"Two's" exchange for 1-year gold notes and 30-year gold bonds.....	172
Thirty-year 3 per cent gold, without circulating privileges.....	172
In exchange for 1-year 3 per cent Treasury notes.....	172
Branch:	
Federal reserve banks.....	101
National banks —	
Foreign.....	193
In dependencies.....	193
By-laws of Federal reserve banks.....	104

## C

Cable transfers, purchase and sale of, in open market.....	154
Acceptable as reserve by Federal reserve banks.....	178
Cancellation of Federal reserve notes.....	159
Capital stock of Federal reserve banks:	
Allotment of.....	89, 103
Cancellation and redemption of.....	116, 117
Dividends.....	118
Hypothecation of, prohibited when owned by member bank.....	113
Increase and decrease of.....	112-117
Liability of holders.....	90, 117
Maximum amount permitted to be held by any one individual or corporation.....	94
Minimum amount of, before organization.....	98
Net earning, apportionment of.....	118
Payment for.....	89, 93
Shares of \$100 each.....	121
Subscriptions to —	112
After organization of Federal reserve banks.....	114
By banks.....	89, 102
By public.....	183
By State banks.....	93, 94
By trust companies.....	102, 121
By trust companies in District of Columbia.....	122
By United States.....	102, 111
Tax fee.....	122
Transfer of.....	102
Voting power of, limited.....	88, 89
By United States.....	95
Tax fee.....	118, 119
Transfer of.....	94, 97
Voting power of, limited.....	113
By United States.....	96

# INDEX TO THE FEDERAL RESERVE ACT

Cash reserve required :	
Banks elsewhere than in reserve cities . . . . .	175
Central reserve city banks . . . . .	177
Reserve city banks . . . . .	176
Central reserve cities . . . . .	99
Cash reserve required . . . . .	177
Number may be increased or decreased . . . . .	140
Reserve board to control . . . . .	140
Status of . . . . .	99
Certificate of :	
Increase of capital of Federal reserve banks . . . . .	115
Organization of Federal reserve banks . . . . .	103
Reduction of capital of Federal reserve banks . . . . .	117
Certificates of deposit as time deposits . . . . .	173
Chairman of board of directors of Federal reserve banks . . . . .	106, 108
Changing collateral for Federal reserve notes . . . . .	163
Charter forfeited by national banks not accepting terms of this act . . . . .	92
Charter of Federal reserve banks to be for 20 years . . . . .	104
Checks receivable at par by Federal reserve banks, when . . . . .	166
Circulating notes of :	
Federal reserve banks, issue of . . . . .	171
Member banks, retirement of . . . . .	169, 170
Circulation ( <i>See</i> Federal reserve bank notes and Federal reserve notes :)	
Federal reserve notes . . . . .	156, 157
Limit to liability of national banks not to include . . . . .	153
Civil service, President may place employees of Federal Reserve Board under . . . . .	147
Class A directors . . . . .	106, 107
Class B directors . . . . .	106, 107
Class C directors . . . . .	106, 111
Clearing house for Federal reserve banks and member banks . . . . .	167
Collateral for Federal reserve notes . . . . .	157
Substitution of . . . . .	163
Collection charges . . . . .	167
Collateral, limit to liability of national banks not to include . . . . .	153
Commercial paper :	
Eligible for rediscount . . . . .	151
Foreign . . . . .	154
Purchase and sale of . . . . .	154
Security for Federal reserve notes . . . . .	157
Comptroller of the Currency :	
Duties performed under direction of the Secretary of Treasury . . . . .	134
Duties when Federal reserve districts have been established . . . . .	102
Examination of member banks . . . . .	185
Examiners' salaries, recommended by . . . . .	186
Examiners' reports to . . . . .	185
Expense of examination assessed by . . . . .	186
Federal reserve notes, issued by . . . . .	139
Federal reserve notes, unfit for circulation, to be returned to . . . . .	159
May permit examiners to disclose information in regard to member banks . . . . .	190
Member of Federal Reserve Board . . . . .	126
Member of Reserve Bank Organization Committee . . . . .	86
National-bank examiners appointed by . . . . .	185
Organization certificate of Federal reserve banks to be filed with . . . . .	103
Plates, dies, etc., for Federal reserve notes under supervision and control of . . . . .	164

# INDEX TO THE FEDERAL RESERVE ACT

## Comptroller of the Currency — Continued.

Powers of . . . . .	134
Salary of . . . . .	126
Suits against national banks not complying with terms of this act . . . . .	92
Congressman not allowed to be member of Federal Reserve Board of officer or director . . . . .	106
Congress, visitatorial powers of . . . . .	187
Contracts, powers of Federal reserve banks to make . . . . .	104
Conversion of State banks . . . . .	120
Corporate seal, Federal reserve banks . . . . .	104
Correspondents, foreign . . . . .	154
Council, Federal advisory . . . . .	148, 149
Country banks :	
Cash reserve required . . . . .	175
Distribution of reserve . . . . .	175
Reserve requirements for . . . . .	175
Reserve required to be held with Federal reserve bank . . . . .	175, 178
Reserve that may be held with bank in reserve or central reserve city . . . . .	175
County bonds, etc., dealt in by Federal reserve banks . . . . .	154
Currency act of March 14, 1900, parity provisions reaffirmed . . . . .	194
Currency associations . . . . .	195
Customs, Federal reserve notes receivable for . . . . .	156

## D

Daily report by Federal reserves agent of Federal reserve notes . . . . .	157
Definitions . . . . .	85
Demand and time deposits . . . . .	173
Demand deposits defined . . . . .	173
Dependencies :	
Branches of national banks in . . . . .	193
National banks in . . . . .	183
Depositories . . . . .	155
Deposits :	
In Federal reserve banks . . . . .	150, 154
Reserves against . . . . .	155
In member banks, reserves against . . . . .	158
Limit to liability of national banks not to include . . . . .	174, 182
Of Government funds . . . . .	153
Various kinds defined . . . . .	150, 155
With Federal reserve agent of Federal reserve notes, gold, etc., by Federal reserve banks . . . . .	173
With nonmember banks, limited . . . . .	162, 163
Denomination of gold notes issuable to Federal reserve banks . . . . .	180
Deputy Federal reserve agent . . . . .	172
Description of Federal reserve notes . . . . .	108
Destruction of Federal reserve notes . . . . .	159, 164
Dies, etc., for Federal reserve notes . . . . .	159
Directors ( <i>See</i> Federal reserve banks, directors of) :	164
Branch Federal reserve banks . . . . .	
Liability for violation of this act by national banks . . . . .	101
Not to receive fee or other considerations other than usual fee or salary . . . . .	92
Of Federal reserve banks, suspension or removal of . . . . .	190
Of a member bank or of Federal reserve bank, class A, may become directors of two other banks with consent of Board . . . . .	141
Of a member bank may be director of a foreign branch . . . . .	199D
	199E

# INDEX TO THE FEDERAL RESERVE ACT

Discount rates :	
Established.....	154
Increased by tax on deficiency in reserve requirements. ....	138
Recommendations by council.....	149
Discounts :	
By Federal reserve banks.....	151
Extended to member banks.....	105
Dissolution of :	
Federal reserve bank.....	104, 118
National member banks.....	92
Distribution of reserve :	
Banks elsewhere than in reserve city.....	175, 178
Central reserve city, banks in.....	177, 178
Reserve city, banks in.....	176, 178
District :	
Bonds, etc., dealt in by Federal reserve banks.....	154
Certificates showing geographical lines of Federal reserve...	102
Held to mean Federal reserve district.....	85
District of Columbia, trust companies in, eligible.....	88
Dividends :	
Of Federal reserve banks.....	118
Prohibited when reserve is short.....	181
Unpaid, limit to liability of national banks not to include...	153
Doubtful assets of Federal reserve banks, written off.....	142
Drafts :	
Limit to liability to national banks, not to include.....	153
Receivable at par by Federal reserve banks, when.....	166
Rediscounted by Federal reserve banks.....	151
Drainage, bonds, etc., dealt in by Federal reserve banks.....	154
Duties :	
Of Federal advisory council.....	148
Of Reserve Bank Organization Committee.....	86

## E

Earnings, division of.....	118
Election of directors of Class A and Class B.....	107
Eligible banks.....	88, 120
	121, 125
Employees not to receive fee or other consideration other than usual salary.....	190
Employees of Federal reserve banks.....	104
Employees of Federal Reserve Board.....	147
Employee of member bank may become employee of two other banks with consent of Board.....	199E
Employee of member bank may be employee of foreign branch.....	199E
Estimate of reserve requirements.....	182
Examiners :	
Appointment of.....	185
Powers of.....	185
Qualifications of.....	185
Reports of.....	185
Salaries of.....	186
Examinations :	
Assessments for.....	186
Bank.....	185-189
	193
Examiners to make.....	185
Expense of.....	186
Federal reserve banks.....	188
Member banks.....	185, 187



# INDEX TO THE FEDERAL RESERVE ACT

## Examinations—Continued.

National banks.....	185
Number to be made.....	185
Of foreign branches of national banks.....	193
Of plates, dies, bed pieces, etc., of Federal reserve notes..	164
Qualifications of examiners.....	185
State bank and trust companies.....	185
Exceptions to limit to liability of national banks.....	153
Exchange, account with other Federal reserve banks for purposes of.....	154
Exchange charges.....	167
Exchange of certain United States bonds for gold notes.....	172
Executive officers of Federal Reserve Board.....	126
Executors, national banks as.....	146
Exempt from taxes, gold notes issued in exchange for gold bonds.....	172
Expenses:	
For Federal reserve notes.....	164, 165
Of examiners.....	186
Of Federal advisory council.....	148
Of Federal Reserve Board.....	128
Exports, acceptances on, eligible as discounts by Federal reserve and member banks.....	152
Extension of additional currency act to June 30, 1915.....	195

## F

Failure to accept terms of this act.....	91, 92
Farm lands, loans on.....	192
Federal advisory council.....	148, 149
Federal reserve agent.....	108
Bond required of.....	144
Daily report on issue and withdrawal of Federal reserve notes.....	157
Deposits with, of Federal reserve notes, gold, etc., by Federal reserve banks.....	162, 163
Deputy.....	108
Federal reserve notes issued to Federal reserve banks through.....	156
Federal reserve notes, applications for, made to.....	157
Information concerning member banks to be furnished Federal Reserve Board by.....	187
Powers of, second to those of Secretary of Treasury.....	132
Salary of.....	108
Special examination of member banks to be approved by.....	187
Federal reserve banks.....	87
Acceptances, purchase and sale of, in open market.....	154
Rediscount of.....	152, 153
Account with other Federal reserve banks.....	150, 154
Accounts of, for foreign correspondents or agencies.....	167
Advances to, by means of Federal reserve notes.....	199E
Advances to member banks by, on their promissory notes..	156
Amount of capital stock to be subscribed to.....	199E
Application for Federal reserve notes subject to action of Federal Reserve Board.....	89
Bankers' acceptances, purchase and sale of, in open market	
Bills of exchange—	
Purchase and sale of.....	161
Purchase from member banks.....	154
Bills of State and political subdivision thereof dealt in....	154

# INDEX TO THE FEDERAL RESERVE ACT

## Federal reserve banks — Continued.

Branches . . . . .	101
Foreign connections . . . . .	154
By-laws . . . . .	104
Cable transfers, purchase and sale of . . . . .	154
Capital stock of . . . . .	98
Certificate of organization . . . . .	102
Charter, term of . . . . .	104
Checks received at par, when . . . . .	166
Circulating notes, issue of . . . . .	171
Circulating notes, redemption of . . . . .	171
Clearing-house provisions . . . . .	167
Collateral deposited with Federal reserve agent for Federal reserve notes . . . . .	157
Increasing, to reduce liability for notes . . . . .	162
Substitution of . . . . .	163
Withdrawal of . . . . .	163
Collection charges . . . . .	167
Commercial paper —	
Purchase and sale of . . . . .	154
Rediscount of . . . . .	151-153
Security for Federal reserve notes . . . . .	157, 162
	163
Contracts, power to make . . . . .	104
Corporate body . . . . .	104
Powers of . . . . .	104
Council, recommendations by . . . . .	149
Depository, Government . . . . .	150, 155
Deposits —	
Defined and classified . . . . .	173
From member banks . . . . .	150, 166
From or in other Federal reserve banks . . . . .	150, 154
	168
From the United States . . . . .	150, 155
Reserves against . . . . .	158
With Federal reserve agent of Federal reserve notes, gold, etc. . . . .	162, 163
Directors . . . . .	105, 111
Chairman of (Federal reserve agent) . . . . .	106, 108
Bond required of . . . . .	144
Chosen, how . . . . .	106, 107
	108
Classification of . . . . .	106
Compensation of . . . . .	109
Duties of . . . . .	105
Extension of discount, advancement and accommoda- tions by . . . . .	105
Number and classification of . . . . .	106
Qualifications of . . . . .	106
Removal of . . . . .	141
Suspension of . . . . .	141
Term of . . . . .	106, 111
Vacancies . . . . .	111
Discount rates to be established . . . . .	138, 154
Dissolution of . . . . .	104, 118
Dividends of . . . . .	118
Doubtful assets of, to be written off . . . . .	142
Drafts, received at par, when . . . . .	168
Earnings, divisions of . . . . .	118
Eligible paper as described in section 13, Federal reserve act, may be accepted as reserve from member banks . . .	178

# INDEX TO THE FEDERAL RESERVE ACT

## Federal reserve banks — Continued.

Employees .....	104
Establishment of, to be officially announced by Secretary of Treasury .....	174
Examination of .....	188
Examination of member banks by .....	187
Exchange charges .....	167
Expense of Federal Reserve Board to be paid by .....	128
Federal reserve notes. ( <i>See</i> Federal reserve notes.)	
Fiscal agent of the United States .....	155
Foreign connections .....	154
Franchise tax .....	118
Gold bond, 30-year 3 per cent without circulating privilege	172
Under same general terms as United States threes without circulating privilege now issued .....	172
Gold loans, made of, and contracted for .....	154
Gold, purchase and sale of .....	149, 154
Gold notes, 1-year 3 per cent without circulating privilege ..	172
Exempt from taxes .....	172
Government deposits .....	150, 155
Hypothecation of United States bonds for gold loans ....	154
Individual liability of shareholders .....	90
Liquidation of .....	118, 143
Loans made of, and contracted for .....	154
Municipal securities dealt in .....	154
National banks must become shareholders of .....	88, 91, 92
Net earnings of, apportionment of .....	118
Notes of ( <i>see</i> Federal reserve notes) .....	104, 139
Notes of State and political subdivisions thereof dealt in	154
Officers and employees .....	104
Officers of, may be removed or suspended .....	141
Open-market operations .....	154
Organization of .....	87, 103, 110
Official announcement of, by Secretary of Treasury ..	174
Powers of .....	150, 154
	104
Purchase of United States bonds from member banks ....	170
Redemption fund .....	159, 160
	162
Rediscount —	
Of acceptances .....	152, 199 E
Of bills receivable .....	151
Of notes, drafts, and bills of exchange .....	151
Of paper of other Federal reserve banks .....	137
Recommendations by council .....	149
Regulations by board .....	137, 153
Refunding United States bonds held by member banks ...	169, 171
Reorganization of .....	143
Reserve required to be held with —	
By banks elsewhere than in reserve cities .....	175, 178
By central reserve cities .....	177, 178
By reserve city banks .....	176, 178
Reserve requirements for Federal reserve notes .....	158, 160
May be suspended by board .....	138
Tax on deficiency in .....	138
Reserve, withdrawal of, by member banks .....	181
Reserves —	
Against deposits .....	158
Against Federal reserve notes .....	158, 160
Of member banks with .....	174, 182
Paper acceptable .....	178

# INDEX TO THE FEDERAL RESERVE ACT

## Federal reserve banks—Continued.

Revenue bonds of State and political subdivisions, dealt in	154
Safeguarding bonds, notes, collateral, funds, etc. ....	144
Salaries and expenses of board paid by. ....	128, 147
Seal, corporate. ....	104
Senators, Representatives, prohibited from being directors of. ....	106
Special examinations of member banks may be ordered by	187
State banks may become members. ....	121-125
State bills, notes, bonds, and warrants dealt in. ....	154
Statement of condition to be published weekly by board. .	136
Stockholders of, responsibility and liability of. ....	90, 117
Stock of. ( <i>See</i> Capital stock.)	
Succession of. ....	104
Suits, by or against. ....	104
Supervision of, by board. ....	136, 145
Surplus funds. ....	118
Suspension of. ....	143
Taxes, free from, except on real estate. ....	119
Transfer of funds among, and charges therefor. ....	167
United States bonds —	
Dealt in. ....	154
Hypothecated for gold loans. ....	154
United States bonds of member banks purchased by. ....	170, 171
United States deposits. ....	150, 155
Warrants of State and political subdivisions thereof dealt in	154
Worthless assets to be written off. ....	142
<b>Federal Reserve Board:</b>	
Admission of banks other than national. ....	111, 125
Annual report of. ....	133
Application for Federal reserve notes may be granted or rejected by. ....	161
Approval of, required for issue of bonds in exchange for 1-year gold notes. ....	172
Approval of, required to become officer, director or employee of other banks. ....	199 D
Authorize to review decisions of Reserve Bank Organization Committee. ....	86
Chairman of. ....	129 D
Class C directors designated by. ....	106, 108
Clearing house —	
For reserve banks, designation by. ....	167
For member banks, designation by. ....	167
Creation of. ....	126
Directors of Federal reserve banks may be suspended or removed by. ....	141
Discounts by Federal reserve banks, character to be determined by. ....	151
Discount rates subject to approval of. ....	154
Doubtful or worthless assets of Federal reserve banks to be ordered written off books of Federal reserve banks. ....	142
Employees of, not in classified service. ....	147
Examinations of Federal reserve banks and member banks	136
Examinations ordered by. ....	185, 188
Examiners' salary fixed by. ....	186
Expenses of, how paid. ....	128, 147
Extension of discounts, etc., by directors, subject to orders of. ....	105
Federal advisory council, expenses to be approved by. ....	148
Federal reserve banks may be required to purchase United States bonds by. ....	170, 171

# INDEX TO THE FEDERAL RESERVE ACT

## Federal Reserve Board — Continued.

Federal reserve notes issued under the supervision of....	134
Federal reserve notes issued and retirement regulated by	139
Foreign branches of national banks.....	193
Foreign business to be approved by.....	154
Governor of .....	127
Information concerning Federal reserve banks to be furnished to, by Federal reserve agent.....	187
Issue of Federal reserve notes regulated by.....	156, 157
Interest on rediscounts to be fixed by.....	137
Making farm loans.....	192
May withhold or withdraw consent to be officer, directors or employees of other banks ..	199D
Meetings of.....	129
Members of.....	126
Conditions precedent on.....	126, 130
Oath of office.....	126, 130
Qualifications of.....	127
Removal of, by President.....	126
Restriction on, during and after term of office.....	126, 130
Salaries of.....	126
Term of.....	126
National banks to act as trustee, etc., by permission of...	146
Offices.....	127
Open-market operation operated by.....	154
Permission for member banks to secure discounts for non-member banks may be granted by.....	180
Powers of.....	135-147
	199E
Powers secondary to those of Secretary of Treasury, when	132
Power to add to list of cities prohibited from making farm loans.....	192
Purchase of United States bonds by Federal reserve banks on order of.....	170
Redemption fund for Federal reserve notes to be required by.....	160
Rediscouting of paper of Federal reserve banks by other Federal reserve banks.....	137
Report of, to House of Representatives.....	133
Safeguarding assets of Federal reserve banks by.....	144
Special examination of member banks to be approved by...	187
Substitution of collateral for Federal reserve notes to be regulated by.....	163
Suits against national banks not complying with terms of this act.....	92
Suspension of reserve requirements by.....	138
Transfer of public stock in Federal reserve banks to be regulated by.....	97
Vacancies.....	131
Vice governor.....	127
Violations of act, of Federal reserve banks, duty of.....	143
Federal reserve cities.....	86, 102
Federal reserve banks therein.....	87
Federal reserve districts.....	86, 102
Designation by number.....	86
Farm land loans confined to.....	192
How apportioned.....	86
Increase in number of.....	86
Readjustment of.....	86
Federal reserve notes (obligations of United States):	
Acceptable for, what.....	156

# INDEX TO THE FEDERAL RESERVE ACT

Federal reserve notes (obligations of United States)—Continued.	
Application for .....	139, 157, 161
Authorization of .....	156
Cancellation and destruction of .....	159
Character of .....	159, 164
Collateral for .....	157
Cost of making, etc. ....	164, 165
Daily report of issue and withdrawal of .....	157
Denominations of .....	164
Deposit by bank of issue with Federal reserve agent .....	162
Description of .....	159, 164
Destruction of .....	159
Examination of plates, dies, etc. ....	164
Expense for making, issue, and redemption paid by Federal reserve banks .....	164, 165
Form of .....	164
Held for distribution, where .....	164
Identification marks on .....	159, 164
Interest paid to United States on account of .....	161
Issue and retirement of, regulated by board .....	139, 156
Liability for, may be reduced .....	162
Lien on assets .....	161
Paper for .....	165
Penalty for paying out, by Federal reserve bank, other than bank of issue .....	159
Plates, dies, paper, etc. ....	164, 165
Printing of .....	164, 165
Purpose of .....	158
Receivable for, what .....	158
Received by Federal reserve bank other than bank of issue .....	159
Recommendations concerning, by council .....	149
Redeemed in gold on demand .....	156
Redemption fund .....	159, 160
Redemption of .....	156, 159
Reduction of, liability for .....	162
Reissue of notes deposited with Federal reserve agent .....	162
Reserves against .....	158, 160
Return to bank of issue .....	159
Securities for .....	157, 158
Substitution of collateral for .....	163
Supervision of .....	139
Federal reserve notes (circulating, obligations of Federal reserve banks) .....	104
For United States bonds purchased of member banks by Federal reserve banks .....	104, 171
For United States bonds with circulation privilege against which no circulation is outstanding .....	104, 171
Issued and redeemed as national-bank notes .....	104, 171
Fiscal agent of United States:	
Federal reserve banks as .....	155
In foreign countries, dependencies .....	193
Five per cent redemption fund not counted as reserve .....	184
Foreign acceptances .....	154
Foreign agencies of Federal reserve banks .....	154
Foreign branches of national banks .....	193
Foreign correspondents .....	154
Forfeiture of charter by national banks for not accepting terms of this act .....	92
Franchise tax on Federal reserve banks .....	118

# INDEX TO THE FEDERAL RESERVE ACT

## G

General fund of United States may be deposited in Federal reserve banks. ....	155
General fund of United States Treasury may be deposited in Federal reserve banks. ....	155
General repealing clause. ....	194
General supervision of Federal reserve banks by board. ....	145
Gold bonds, 30-year 3 per cent, without circulation privilege. .	172
Under same conditions as United States 3 per cent without circulation privilege now issued. ....	172
Gold deposits for reduction of Federal reserve notes. ....	162
Gold loans by Federal reserve banks. ....	154
Gold notes, 3 per cent, 1 year, without circulation privilege. .	172
Exempt from taxes. ....	172
May be exchanged for 30-year 3 per cent gold bonds. ....	172
Gold, purchase and sale of, by Federal reserve banks. ....	149, 154
Gold, redemption fund for Federal reserve notes to be in. ....	160
Gold reserve required for Federal reserve notes. ....	158
Government deposits. ....	150, 155
Government funds to be deposited, where. ....	155
Governor of Federal Reserve Board. ....	127
Granting of application for Federal reserve notes. ....	161
Gratuities to bank examiners prohibited. ....	189

## H

Hawaii, reserve requirements, etc., for national banks in. ....	183
House of Representatives, annual report of Federal Reserve Board to. ....	133
Hypothecation :	
Of Federal reserve bank stock by member banks prohibited	113
Of United States bonds by Federal reserve banks for gold loans. ....	154

## I

Imports, acceptances on, eligible as discounts by Federal reserve and member banks. ....	152
Incidental powers necessary to comply with this act. ....	104
Income from Federal reserve bank exempt from taxation. ....	119
Increase of capital of Federal reserve banks. ....	112, 115
Individual liability of shareholders. ....	90
Individual liability of stockholders of national banks. ....	191
Information concerning member banks to be furnished Federal Reserve Board by Federal reserve agent. ....	187
Information, examiners not to disclose. ....	190
Insolvent member banks. ....	117
Interest rate for rediscount fixed by board. ....	137, 153
Interest rate increased by tax on deficiency in reserve requirements. ....	138
Interest rates on Federal reserve notes. . . . .	161
Invalidating clause. ....	198
Investment securities not eligible for discount by Federal reserve banks. ....	151
Irrigation bonds, etc., dealt in by Federal reserve banks. ....	154
Issue of circulating notes by Federal reserve banks. ....	171
Issue of Federal reserve notes. ....	156, 157
Issue of gold notes of United States in exchange for certain United States Bonds. ....	172

# INDEX TO THE FEDERAL RESERVE ACT

## L

Lawful money deposits for reduction of Federal reserve notes. . .	162
Lawful money reserve required for Federal reserve notes. . . . .	158
Liabilities incurred under the provisions of this act. . . . .	153
Liabilities of national banks. . . . .	153
Liability for Federal reserve notes, reduction of. . . . .	162
Liability of director of national banks violating this act. . . . .	92
Liability of stockholders:	
Of Federal reserve banks. . . . .	90, 117
Of national banks. . . . .	191
Lien on assets amount of Federal reserve notes first. . . . .	161
Limitations, none on amount of Federal reserve bank notes. . . . .	104
Limit not placed on amount of Federal reserve bank circulating notes. . . . .	171
Limit to amount of acceptance on imports and exports. . . . .	152
By Federal reserve banks. . . . .	152
By member banks. . . . .	152
Limit to amount of gold notes is usable to Federal reserve banks	172
Limit to amount of public stock in Federal reserve bank held by one individual, etc. . . . .	94
Limit to amount of United States bonds that Federal reserve banks may purchase from member banks. . . . .	170
Limit to maturity of discounts by Federal reserve banks. . . . .	151, 152
Liquidating of member banks. . . . .	116
Liquidating of Federal reserve banks. . . . .	118, 143
Loans of gold by Federal reserve banks. . . . .	154
Loans on farm lands. . . . .	192
Loans prohibited when reserve is short. . . . .	181
Loans to bank examiners prohibited. . . . .	189

## M

Manager branch Federal reserve banks. . . . .	101
Market operations open. . . . .	154
Maturity of discounts of Federal reserve banks limited. . . . .	151, 152
Maximum amount of public stock in Federal reserve bank held by one individual, etc. . . . .	94
Meetings of Federal reserve council. . . . .	148
Member banks ( <i>see also</i> National banks). . . . .	85, 88
Acceptance rediscounted by Federal reserve bank. . . . .	120, 121
Acceptance of drafts drawn thereon. . . . .	152
Acting as agent for nonmember banks, restrictions. . . . .	199 E
Alaska. . . . .	180
Application for membership as, after organization of Federal reserve bank. . . . .	86, 183
Balances in Federal reserve banks, considered as reserve. . .	114
Bills of exchange —	182
Acceptable. . . . .	152
Rediscounted by Federal reserve banks. . . . .	151, 152
Sold to Federal reserve banks. . . . .	154
Collection charges. . . . .	167
Depositories of United States. . . . .	155
Deposits in Federal reserve bank. . . . .	150
Deposits, reserves against. . . . .	174, 176
Deposits with nonmember banks. . . . .	180
Directors not to accept fees other than regular fees. . . . .	190
Dividends are not to be paid when reserves are below requirements. . . . .	181
Drafts —	
Acceptance of, restrictions of. . . . .	199 E



# INDEX TO THE FEDERAL RESERVE ACT

## Member banks — Continued.

Drafts — Continued.	
Acceptable.	152, 199 E
Rediscounted by Federal reserve banks.	151, 152
Examiners.	185
Examinations of.	185, 189
Examinations of Federal reserve banks on request of 10 member banks.	188
Exchange charges.	167
Hypothecation of stock of Federal reserve banks prohibited.	113
Individual liability of.	90
Insolvency of.	117
Limit to deposits that may be kept with nonmember banks	180
Liquidation of.	116
Loans and gratuities to bank examiners prohibited.	189
Loans may not be made when reserves are below requirements.	181
Loans on farm lands.	192
National banks ( <i>see</i> National banks).	89-92, 120
Notes rediscounted by Federal reserve banks.	151, 152
Officers and employees not to accept fees, etc.	190
Outside continental United States.	183
Prohibited from securing discounts from Federal reserve banks for nonmember banks.	180
Provisions for national banks outside continental United States to become.	183
Refunding United States bonds securing circulation.	169, 170
Reserve requirements.	173, 184
Reserve, withdrawal of, from Federal reserve banks.	181
Reserves.	174, 182
Against deposits.	174, 182
Balances in Federal reserve banks considered as.	182
Banks in central reserve cities.	177
Banks in reserve cities.	176
Banks not in central reserve or reserve cities.	175
Checking against, in Federal reserve banks.	181
Net balance due to and from other banks considered in estimating.	182
Paper acceptable as, by Federal reserve banks.	178
State banks as.	121, 125
Deposits with nonmember banks.	180
Examinations of.	185
Reserves.	179
Stock in Federal reserve banks.	89, 102
Transfer of stock in Federal reserve banks.	97, 113
Trust companies as.	121, 125
Deposits with nonmember banks.	180
Examinations of.	185
Reserves.	179
Trust companies in District of Columbia.	88
Members, Federal advisory council.	148
Minimum amount of capital of Federal reserve banks.	98
Mints, Federal reserve notes may be deposited in.	164
Mortgages on farm lands.	192
Municipal securities dealt in by Federal reserve banks.	154

## N

National banking associations:	
Account of such to be independent of others.	199 E
Defined.	85

# INDEX TO THE FEDERAL RESERVE ACT

## National banking associations — Continued.

Examiners of . . . . .	185
May act as agent of insurance company . . . . .	199 E
May act as broker or agent in procuring loans on real estate . . . . .	199 E
Reserve requirements . . . . .	173, 178
Reserve requirements outside continental United States . . . . .	183
Restrictions on purchasing stock in associations operating foreign branches . . . . .	199 D
National-bank examiners ( <i>see also</i> Examiners) :	
Prohibited from performing other services for banks, etc. . . . .	189
Prohibited from receiving loans or gratuities from member banks . . . . .	189
National banks ( <i>see also</i> Member banks) . . . . .	85
Administrators . . . . .	146
Alaska . . . . .	86, 183
Branches in foreign countries and dependencies . . . . .	193, 199 E
Capital stock —	
Decrease of . . . . .	116, 117
Increase of . . . . .	113, 115
Charter bonds no longer required . . . . .	168
Circulation —	
Act of May 30, 1908, extended . . . . .	195
Retirement of . . . . .	169
Tax rate for certain circulating notes changed . . . . .	196
Commencing business, provisions for deposit of United States bonds with Treasury repealed . . . . .	168
Dependencies . . . . .	183
Deposits, time, and interest thereon . . . . .	192
Directors' liability . . . . .	92
Dissolution for failure to enter system . . . . .	92
Executors . . . . .	146
Foreign branches . . . . .	193
Hypothecation of stock in Federal reserve banks . . . . .	113
Liability of . . . . .	153
Loans on farm lands . . . . .	192
Mortgages on farm lands . . . . .	192
Must become member banks . . . . .	88, 91
Notes of —	
Liability for cost of, unaffected . . . . .	165
May be retired . . . . .	169, 170
Other banks may become . . . . .	120
Outside continental United States . . . . .	183
Penalty for failure to enter system . . . . .	91, 92
Philippine Islands . . . . .	183
Redemption fund for notes not counted as reserve . . . . .	184
Refunding bonds . . . . .	169, 170
Registrar of stocks and bonds . . . . .	146
Required to become member banks . . . . .	88, 91
Retirement of circulating notes . . . . .	169, 170
State banks may convert to . . . . .	120
Stock in Federal reserve bank . . . . .	89, 102
Stockholders, responsibility and liability . . . . .	112
Surplus, increase or decrease of . . . . .	92, 191
Time deposits and interest thereon . . . . .	112
Transfer of stock in Federal reserve banks . . . . .	192
Trustees . . . . .	97, 113
National currency association . . . . .	146
	195

# INDEX TO THE FEDERAL RESERVE ACT

Nonmember banks:	
Alaska.....	183
Amount of deposits that may be kept with nonmember banks restricted.....	180
Deposits with.....	180
Discounts from Federal reserve banks not allowed through member banks.....	180
Member banks may not act as agents for, in applying for or receiving discounts from Federal reserve banks.....	180
Outside continental United States.....	183
Nonmember national banks, reserve requirements.....	183
Notes:	
Federal reserve. (See Federal reserve notes.)	
Of State or political subdivisions thereof dealt in by Federal reserve banks.....	154
Rediscounted by Federal reserve banks.....	151, 152
Treasury, 1-year 3 per cent, coupon or registered.....	172
Exempt from taxes.....	172
May be changed for 30-year 3 per cent gold bonds....	172
Number of examinations to be made.....	185
Number of Federal reserve cities.....	86

## O

Obligation of Federal reserve banks to purchase gold notes....	172
Obligations of Federal reserve banks, circulating notes are....	171
Obligations of United States, Federal reserve notes.....	158
Officer of member bank may become an officer of the other bank with consent of Board.....	199 D
Officer of member bank may be officer of a foreign branch....	199 E
Officers and employees of Federal reserve banks.....	104
Officers not to receive fee or other consideration other than usual fee or salary.....	190
Officers of Federal reserve banks, suspension or removal of....	141
Open-market operations.....	154
Recommendations by council.....	149
Organization certificate of Federal reserve banks.....	103
Organization committee. (See Reserve bank organization committee.)	
Other reserve cities. (See Reserve cities.)	

## P

Panama, reserve requirements, etc., for national banks in.....	183
Paper for Federal reserve notes.....	165
Party maintained.....	194
Par, when checks and drafts receivable by Federal reserve banks at.....	166
Payment of expenses of organization committee.....	100
Payments of capital stock subscriptions.....	89
Penalties:	
Acceptance of fees, etc., by directors, officers, and employees of member banks.....	190
Divulging information by bank examiners.....	190
Gratuities to bank examiners.....	189
Loans to bank examiners.....	189
Member banks not national banks for failure to comply with conditions, etc.....	124, 125
National banks failing to comply with provisions of this act	91, 92
Paying out Federal reserve notes by Federal reserve banks other than bank of issue.....	159

# INDEX TO THE FEDERAL RESERVE ACT

Penalties — Continued.	
Reserve shortage.....	181
Violations of act by Federal reserve banks.....	143
Period for which Federal reserve bank charter is issued.....	104
Philippine Islands:	
Bank in, may not become member bank.....	183
Public funds in United States to be deposited in member banks.....	155
Reserve requirements for national banks in.....	183
Plates, dies, etc., for Federal reserve notes.....	164
Political subdivisions, bonds, etc., dealt in by Federal reserve banks.....	164
Porto Rico, reserve requirements, etc., for national banks in..	183
Postal savings funds to be deposited in member banks.....	155
Powers of:	
Examiners.....	185
Federal advisory council.....	149
Federal reserve banks.....	104, 150—154
Federal Reserve Board.....	135—147
Not to conflict with those of Secretary of Treasury....	132
Reserve Bank Organization Committee.....	86
President may place Federal Reserve Board employees under civil service.....	147
President of United States, members of Federal Reserve Board appointed by.....	126, 131
Printing Federal reserve notes.....	164
Prohibitions:	
Central reserve city banks from making farm loans.....	192
Gratuities and loans to bank examiners.....	189
Member banks limited in amount of deposits with and forbidden to secure discounts from Federal reserve banks for nonmember banks.....	180
Members of Federal Reserve Board, Assistant Secretary of Treasury, and Comptroller of Currency not to hold office in any member bank.....	126, 130
National-bank examiners not to perform other services for banks, etc.....	189
Officers and employees, from receiving fee or other consideration other than usual salary or fee.....	190
Public funds of Philippine Islands, postal savings, or any Government funds not to be deposited in any bank other than member bank.....	155
Reserve shortage.....	181
Restrictions as to visitatorial powers.....	187
Senators and Representatives not allowed to be members of Federal Reserve Board or directors of Federal reserve bank.....	106
Transacting business by Federal reserve bank until authorized by Comptroller.....	104
Profits, undivided, limit to liability of national bank not to include.....	153
Provisions for national banks outside continental United States to become member banks.....	183
Public dues, Federal reserve notes receivable for.....	156
Public Federal reserve bank stock.....	93
Amount of, limited to any one individual or corporation..	94
Liability of holders of.....	90, 93
Par value of.....	93, 112
Payment for.....	89, 93
Tax free.....	119

# INDEX TO THE FEDERAL RESERVE ACT

## Public Federal reserve bank stock — Continued.

Transfer of.....	94
Voting power, none.....	96
Purchase of:	
Bills of exchange from member banks.....	154
Gold notes by Federal reserve banks.....	172
United States bonds by Federal reserve banks.....	170

## Q

Qualification of examiners .....	185
----------------------------------	-----

## R

Rate of taxation on "additional currency".....	196
Rates of discount .....	137, 138
	154
Rates of interest on Federal reserve notes.....	161
Real estate loans, farm lands.....	192
Reclamation bonds, etc., dealt in by Federal reserve bank.....	154
Redemption fund:	
In United States Treasury for Federal reserve notes.....	159, 160
Not counted as reserve (5 per cent, of national banks)....	162
Of Federal reserve notes.....	184
Redemption of Federal reserve bank circulating notes.....	171
Rediscount by Federal reserve banks:	
Acceptances.....	152
Bills of exchange.....	151
Bills receivable.....	151
Drafts.....	151, 199 E
Notes.....	151, 199 E
Paper discounted by other Federal reserve banks.....	137
Paper, rediscounted, as collateral for Federal reserve notes	157
Recommendations by council.....	149
Regulations by board.....	137, 153
Reduction:	
Of capital of Federal reserve bank.....	112, 116
Of liability for Federal reserve notes.....	117
Refunding bonds.....	162
Refunding bonds.....	169-172
Registrar of stock and bonds, national bank as.....	146
Regulations:	
For Federal reserve notes.....	139
For transfer of funds and charges therefor among Federal	
reserve banks.....	167
For transfer of public stock in Federal reserve banks.....	97
To be prescribed by organization committee.....	88
Reissue of Federal reserve notes deposited with Federal reserve	
agent.....	162
Rejection of application for Federal reserve notes.....	161
Removal or suspension of officer or director of Federal reserve	
bank.....	141
Reorganization of Federal reserve banks.....	143
Repealing clause, general.....	194
Report of board to House of Representatives.....	133
Report of condition by Federal reserve banks, weekly.....	136
Reports:	
Of examination.....	185
Of foreign branches of national banks.....	193
Representatives not allowed to become members of Federal Re-	
serve Board or directors of Federal reserve banks.....	106

# INDEX TO THE FEDERAL RESERVE ACT

Requiring national banks to become member banks.....	88
Reserve banks held to mean Federal reserve banks.....	85
Reserve bank organization committee.....	86
Admission of banks other than national banks.....	121, 122
Allots stock of Federal reserve banks to United States....	95
Appropriation for expenses of.....	100
Certificates showing districts to be filed with Comptroller	102
Designates Federal reserve cities and districts.....	86, 87
Exercises powers of chairman of Federal Reserve Board	
until such is appointed.....	106, 107
General powers of.....	110
How constituted.....	87, 100
Majority of quorum.....	86
Offers stock of Federal reserve bank to public.....	86
Organizes each Federal reserve bank.....	93
Reserve cities.....	87
Cash reserve required.....	99
Distribution of reserve.....	176
Federal Reserve Board to control.....	176
Number may be increased or decreased.....	140
Reserve requirements.....	140
Reserve that may be held with, by banks elsewhere than in	176
reserve cities.....	175
Reserve districts. ( <i>See</i> Federal reserve districts.)	
Reserve requirements of Federal reserve banks:	
Against deposits.....	158
Against Federal reserve notes.....	158, 160
How estimated.....	182
Five per cent redemption fund not counted as reserve....	184
Recommendations by council.....	149
Suspension of, by board.....	138
Tax on deficiency in.....	138
Reserve requirements of member banks.....	174-182
Banks in central reserve cities.....	177
Banks in reserve cities.....	176
Banks not in central reserve or reserve cities.....	175
Country banks.....	175
Central reserve cities.....	177
Estimate of.....	182
Reserve cities other than central.....	176
State banks and trust companies.....	179
To be held with Federal reserve banks.....	178
When effective.....	174
Reserve:	
That may be held with member banks.....	175, 176
Withdrawal of, from Federal reserve banks.....	181
Reserves, tax on deficiency in.....	138
Increase rates of interest and discount.....	138
Restriction, visitatorial powers limited.....	187
Retirement of:	
Federal reserve notes.....	139
National-bank notes.....	169, 170
Revenue bonds of State or political subdivisions thereof dealt in	
by Federal reserve banks.....	154

## S

Safeguarding assets of Federal reserve banks.....	144
Salaries:	
Of examiners.....	186

# INDEX TO THE FEDERAL RESERVE ACT

Salaries — Continued.	
Of Federal Reserve Board employees . . . . .	147
Of members of Federal Reserve Board . . . . .	126
Salary :	
Director Federal reserve bank . . . . .	109
Federal reserve agent . . . . .	108
Savings accounts as time deposits . . . . .	173
Seal of Federal reserve bank . . . . .	104
Secretary of Agriculture, member of Reserve Bank Organization Committee . . . . .	86
Secretary of Treasury :	
Amount of redemption fund for Federal reserve notes determined by . . . . .	160
Assistant, restrictions on, subject to term . . . . .	126
Circulating notes of Federal reserve banks, form to be prescribed by . . . . .	171
Chairman of Federal Reserve Board . . . . .	129
Deposit of Government funds upon direction of . . . . .	155
Earnings from Federal reserve banks to be used under regulations prescribed by . . . . .	118
Examiners' appointment to be approved by . . . . .	185
Gold notes and bonds issued in exchange for certain United States bonds by . . . . .	172
Maintaining of parity . . . . .	194
Member of Federal Reserve Board . . . . .	126
Member of Reserve Bank Organization Committee . . . . .	86
Payment of expenses of Organization Committee to be approved by . . . . .	100
Plates, dies, etc., for Federal reserve notes engraved by direction of . . . . .	164
Powers heretofore vested in, unchanged . . . . .	132
Redemption fund for Federal reserve notes controlled by . . . . .	159
Redemption fund required by . . . . .	155
Strengthening gold reserves . . . . .	194
Section 5154, United States Revised Statutes, amended . . . . .	110
Securities :	
Dealt in by Federal reserve banks . . . . .	154
Purchase and sale of recommended by council . . . . .	149
Security :	
For Federal reserve notes . . . . .	157, 158
For gold transactions . . . . .	154
Senate, members of Federal Reserve Board to be confirmed by . . . . .	126
Senators and Representatives not allowed to be members of Federal Reserve Board or officers or directors of Federal reserve banks . . . . .	106
Shareholders of Federal reserve banks, liability of . . . . .	90, 117
Short title, "Federal Reserve Act" . . . . .	84
Special examination of foreign branches of national banks . . . . .	193
State banks, reserve requirements modified to conform to State laws . . . . .	179.
State banks as member banks . . . . .	85, 121
Deposits with nonmember banks . . . . .	125
Examinations of . . . . .	180
Requirements precedent . . . . .	185
Requirements subsequent . . . . .	122
Reserves of . . . . .	123, 124
Subscription to stock . . . . .	179
Surrender of privileges . . . . .	121
State banks may become national banks . . . . .	125
	120

# INDEX TO THE FEDERAL RESERVE ACT

State revenue bonds, warrants, etc., dealt in by Federal reserve banks.....	154
Statement of condition of Federal reserve banks, weekly.....	136
Strengthening gold reserves of the United States.....	194
Stock of Federal reserve banks. (See Capital stock.)	
Stockholders of Federal reserve banks, liability of.....	90, 117
Stockholders of national banks, responsibility and liability of..	92, 191
Subscription to capital stock of Federal reserve banks:	
After organization of Federal reserve banks.....	114
By banks.....	89, 102
By public.....	93
By State banks.....	102, 121
.....	122
By trust companies.....	102, 121
.....	122
By trust companies in the District of Columbia.....	89, 102
By United States.....	95
Substitution of collateral for Federal reserve notes.....	163
Subtreasury, Federal reserve notes may be deposited in.....	164
Succession of Federal reserve banks.....	104
Suits against national banks not complying with terms of this act.....	92
Suits by or against Federal reserve banks.....	104
Supervision of:	
Federal reserve banks by board.....	145
Federal reserve notes.....	139
Surplus funds of Federal reserve banks.....	118
Free from taxation.....	119
On dissolution or liquidation.....	118
Suspension:	
Of Federal reserve banks.....	143
Of reserve requirements by Federal Reserve Board.....	138
Or removal of officers or directors of Federal reserve banks ..	141

## T

Taxes:	
Federal reserve banks free from, except on real estate....	119
Federal reserve notes receivable for.....	156
For paying out Federal reserve notes by bank other than bank of issue.....	159
Franchise, by Federal reserve banks.....	118
Gold notes, 1 year, 3 per cent, without circulation privilege, free from.....	172
Income on capital stock and surplus of Federal reserve banks free from.....	119
On deficiency in reserve requirements.....	138
Rates of, for certain circulating notes of national banks changed.....	196, 199 A
Term of office for directors of Federal reserve banks.....	106, 111
Time deposits defined.....	173
Time deposits in national banks.....	192
Title "Federal reserve act".....	84
Transfer of Federal reserve stock.....	94, 95, 113
Transfer of national bank stock, effect of, on liability of stockholder.....	191
Treasurer of United States:	
Application to, for retirement of circulating notes by member banks.....	169, 170
Expenses of organization committee payable by.....	100
Federal reserve notes received by.....	159



# INDEX TO THE FEDERAL RESERVE ACT

## Treasurer of United States — Continued.

Quarterly report to Federal Reserve Board of applications to sell bonds. ....	170
Treasury Department:	
Federal reserve notes redeemable at. ....	156
Federal reserve notes may be deposited in. ....	164
Treasury gold notes issuable to Federal reserve banks in exchange for certain United States bonds. ....	172
Trust companies:	
As member banks ( <i>see</i> State banks as member banks)....	85, 88
In District of Columbia. ....	120, 125
(Member) examinations. ....	88
Reserve requirements modified to conform to State laws..	185
Trustees, national banks as. ....	179
	146

## U

### United States:

Applications to sell bonds. ....	169
Deposits in banks. ....	155
Earnings of Federal reserve banks accruing to. ....	118
Federal reserve notes, obligations of. ....	156
Treasurer, quarterly report to Federal reserve bank of. ....	170
United States bonds. ( <i>See also</i> Bonds, United States):	
Charter requirements for national banks repealed. ....	168
Dealings in, by Federal reserve banks. ....	154
Hypothecation of, for gold by Federal reserve banks. ....	154
Refunding. ....	169-172
Purchase of, by Federal reserve banks. ....	170
Thirty-year 3 per cent gold, exchanged for 1-year 3 per cent Treasury notes. ....	172
Twos exchanged for 1-year 3 per cent gold notes. ....	172
Twos exchanged for 30-year 3 per cent gold bonds. ....	172
United States deposits of Government funds. ....	150, 155
United States Federal reserve bank stock. ....	95
Unpaid dividends, limit to liability of national banks not to include. ....	153
Undivided profits, limit to liability of national banks not to include. ....	153

## V

Vacancies in membership of Federal Reserve Board. ....	131
Vice governor of Federal Reserve Board. ....	127
Violation of provisions of act. ....	92, 125
Visitatorial powers over banks restricted. ....	187
Vote required to convert State bank to a national bank. ....	120
Voting power of Federal reserve bank stock. ....	96, 106
	108

## W

Warrants of State or political subdivisions thereof dealt in by Federal reserve banks. ....	152
Weekly statement of condition by Federal reserve banks. ....	136
Withdrawal of:	
Collateral for Federal reserve notes. ....	163
Of reserve from Federal reserve banks. ....	181
Worthless assets of Federal reserve banks to be written off. ....	142



















